Supreme Court, U.S.
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In The Supreme Court Of The United States

Lawrence Litten — Petitioner

Vs.

Grenada County, Mississippi, Et. Al. — Respondent

Supreme Court Cause No. _____

Fletcher Fly — Petitioner

Vs.

Yalobusha County, Mississippi — Respondent

Petition For Writ Of Certiorari

To The Fifth Circuit Court Of Appeals

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(B.) QUESTIONS PRESENTED FOR REVIEW

1. In a §1983 suit for a "physical taking," "permanent occupation," "per se or categorical taking," or " physical invasion," do the ripeness requirements of Williamson County Regional Planning Comm' v. Hamilton Bank of Johnson City, (cited infra), apply?

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(C.) LIST OF ALL PARTIES BEFORE THE COURT

All parties are listed in the caption of the case.

(D.) TABLE OF AUTHORITIES

1. CASE LAW

(i) Federal

1) US Supreme Court

Andrus v. Allard, 444 U.S. 51, 65 66 (1979)

Armstrong v. United States, 364 U.S. 40, 49 (1960)

Block v. Hirsh, 256 U.S. 135 (1921)

Boston Chamber of Commerce v. Boston, 217 U.S. 189, 195 (1910)

Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226 (1897)

City of Monterey v. Del Monte Dunes, 526 US 687 (1999)

Danforth v. United States, 308 U.S. 271, 284 (1939)

Eastern Enterprises v. Apfel, 524 U.S. 498, 522 (1998)

Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)

Fair Assessment in Real Estate Ass'n v. McNary, 454 US 100 (1981)

Jacobs v. United States, 290 U.S. 13, 16 (1933)

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470,517 (1987)

Lingle v. Chevron, 544 US 528,538 (2005)

Loretto v. Teleprompter Manhatten CATV Corp., 458 US 419 (1982)

MacDonald, Sommer & Frates v. Yolo County, 477 U.S 340, 351 (1986)

Monterey v. Del Monte Dunes at Montery, 526 U.S. 687, 727-28 (1999)

Palazallo v. Rhode Island, 533 U.S. 606, 628 (2001)

Penn Central Transportation Co. v. New York City, 438 U.S. 104,124 (1978)

Pumpelly v. Green Bay Co., 13 Wall. 166

San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 654 (1981)

San Remo Hotel v. City and County of San Francisco, 545 US 323, 348-52 (2005)

Suitum v. Tahoe Regional Planning Agency, 520 US 725, 733-734 (1997)

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002)

Teamsters v. Terry, 494 U.S. 558, 570 (1990)

United States v. Clarke, 445 U.S. 253, 257 (1980)

United States v. Causby, 328 U.S. 256 (1946)

United States v. General Motors Corp., 323 U.S. 373 (1945)

United States v. Petty Motor Co., 327 U.S. 372 (1946)

United States v. Pewee Coal Co., 341 U.S. 114, 115 (1951)

McClung v. City of Sumner, 548 F.3d 1219 (9th Cir.2008)

Pinewood Estates of Michigan v. Barnegat Township Leveling Board, 898 F2d 397 (3d Cir. 1990)

Ramsey Winch Inc. v. Henry, 555 F.3d 1199 (10th Cir.2009)

Samaad v. City of Dallas, 940 F.2d 925 (5th Cir.1991)

Severance v. Patterson, 566 F.3d 490 (5th Cir.2009)

Sunrise Corp. of Myrtle Beach v. City of Myrtle Beach, 420 F3d 322 (4th Cir.2005)

Tennessee Scrap Recyclers ass'n v. Bredeson, et al, 556 F3d 442 (6th Cir.2009)

Texas Manufactured Housing Ass'n v. City of Nederland, 101 F.3d 1095 (Cir.1996)

US v. Salvatore, 110 F.3d 1131 (5th Cir.1997)

Urban Developers LLC v. City of Jackson, 468 F.3d 281 (5th Cir.2006)

Washington Legal Fdtn. v. Texas Equal Access to Justice Fdtn., 270 F.3d 180 (5th Cir.2001

(ii) State

Ann May Enterprises, Inc. v. Caples, 724 So.2d 1187 (Miss. App.1998)

Long v. Mckinney, 897 So.2d 160, 172 (Miss. 2002)

Statutory Law

(i) Federal

28 USCA § 1331, §1343 AND § 1367
28 USCA § 1254
28 USCA § 1291
42 USCA § 1983

(ii) State

MCA § 65-7-4.1.
MCA§ 65-7-7

(E) BASIS FOR JURISDICTION

(i) The date of the judgment sought to be re viewed is February 23, 2010;

(ii) The only order concerning rehearing was entered on March 12, 2010. It was an order denying Appellants' Motion For Extension of Time to File Petition For Hearing En Banc;

(iii) N/A

(iv) Jurisdiction in the U.S. Supreme Court is proper pursuant to 28 USCA § 1254. Jurisdiction in the Fifth Circuit was pursuant to 28 USCA §1291. Original jurisdiction in the U.S. District Court for the Northern District of Mississippi is asserted under 28 USCA §1331, § 1343, and §1367; and

(v) N/A

(F) PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

(i) Plaintiff/Appellant Fly asserted 42 USCA § 1983 as the vehicle to address the taking by Yalobusha County, Mississippi, of the lengthy strip or strips of land and of approximately 300 yards of a new road built by Fly's brother. Fly asserts violations of the Fifth and Fourteenth Amendments to the U.S. Constitution. Separate state claims are addressed, pursuant to the supplemental jurisdiction of the District Court.

(i) Plaintiff/Appellant Litten asserts 42 USCA § 1983 as the vehicle to address violations under the First, Fourth, Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments to the U.S. Con stitution. Litten also appended state claims pursuant to the Supplemental Jurisdiction of the District Court.

(ii) The basis of jurisdiction in the District Court is 42 USCA § 1983, 28 USCA §§ 1331, 1343 and 1367.

G) STATEMENT OF THE CASE

Two legal occurrences supply the backdrop for this consolidated cause of action. The announcement of this Court's opinion in Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985), and the retinue of cases discussing the "ripeness" requirements in Williamson County are certainly well known to this Court. The indisputable fact that the Circuits are now split on this crucial issue is the basis for this Petition.

Secondly, a Mississippi legislative initiative, undoubtedly constitutional on its face and in its intent, was misapplied by two (2) Mississippi counties, Grenada and Yalobusha. It is unknown whether other counties misapplied the law. While it is likely that there were other abuses, it is not relevant to this cause.

The state initiative mentioned, was the passage, administration, and abuse of Mississippi Code Ann. §§ 65-7-4, et seq, County Road Systems. The purpose of the statute was salutary. It required that in the year 2000, each County, by its Board of Supervisors, would create a registry and maps of all county roads, in an effort to clarify what roads were public and which were private. However, the statute required that if a right-of-way were to be added to the prescriptive easement over a historically publicly used road, the County must pay for it (MCA§ 65-7-7). It was not the state's intention to permit the establishment or opening of new roads, but to identify the roads that already existed. See MCA § 65-7-4.1. Unfortunately, many Boards of Supervisors, (pertinently the Grenada and

Yalobusha Boards), used the opportunity to dovetail a multiplicity of purposes from the statute.

Fletcher Fly inherited his land in 2001, after the Yalobusha Board had "registered" CR 161, a gravel road lying almost exclusively on Plaintiff's land. CR 161, Plaintiff confessed, was once, in part, a public road.

Fly had also had "neighbor problems" with four wheelers destroying fledgling pine trees, neighbors getting off the public road onto his property, and one "set" of neighbors using Fly's property off of the County Road as a driveway /shortcut to their property.

In 2002, Fly retained counsel, seeking to close the road. The Walkers (one of the neighbor families), retained Yalobusha County Attorney Hon. John Crow. Mr. Crow represented the Walkers until the morning of a hearing before the Board as to the ownership of a 300 foot portion of the road at the north end of Fly's property, which was the Walkers' southern boundary. The Board granted the Walkers' request to "re-take" the portion of their "driveway" (See below). See (RE 97-98).

It seems that the Board and, hence the County, had abandoned the 300 feet of CR 161 after it "washed out" in or around 1972. (See RE 252-260). While the Board President, Mr. Sims, minimizes Mr. Crow's role (RE 97), Mr. Crow prepared and sent to the Mississippi Attorney General a request for an opinion as to the section <u>without</u> Board Mandate. Mr. Crow asserts that he "lost" the request, recapitulated by the

AAG who wrote the Opinion. (RE 259-60). The AAG quotes Mr. Crow as admitting that the County had not maintained that section of the road for 20 years. (RE 259).

The testimony of John Tillman further refined the County Attorney's "admission" (See RE 252-258). Mr. Tillman owned land along CR 161 well back into the 1960s . By his testimony, he places the portion of the road in question (which was "washed out") as "just after you passed the Magee Hunting Club...," exactly the 300 feet addressed by Mr. Crow and the AAG. (RE 253). Mr. Tillman placed the time of the "washout" as being "when Mr. Earl Moorman was serving as supervisor." (RE 256). "I think it was right after Mr. Frank Pate...." (RE 256-57). The records of Yalobusha County indicate that the change of Supervisor from Mr. Pate to Mr. Moorman occurred in 1972. Mr. Tillman testified that he asked the county to reopen CR 161, but they refused and abandoned maintenance of the road "below Magee's Hunting Club." (RE 257).

Under Mississippi law, Fly contends this pre-1986 abandonment of the road along the 300 foot distance lasted until 2003, from somewhere between 1972 (Mr. Tillman) and 1983 (Mr. Crow). Therefore, the physical invasion that occurred in 2003-04 when the County moved in heavy equipment to "repair" the road was a taking of Mr. Fly's land. Additionally, any land claimed by the county as "right-of-way" other than the roadway itself was taken by this "invasion." The county, also claimed a 50 foot "right-of-way" which had been neither given by Fly or his predecessors in title nor taken by prescription.

This led to the instant lawsuit.

In Litten, the Supervisor of Plaintiff's "Beat" intervened in a boundary dispute between neighbors by trespassing on Litten's land and destroying a one-strand electric fence erected to minimize crop loss to deer. See Complaint, (RE 8, et seq). This "invasion" was accomplished after the County Attorney apprised Plaintiff that the county's "right-of-way," (never purchased by the county or "dedicated" by Litten), was from "center of the ditch to center of the ditch." Upon receipt of this opinion, Litten reset his fence beyond the center of the ditch. Nevertheless, after weeks of negotiation, Litten's County Supervisor, Michael Lott, went onto Litten's property (i.e. went onto Litten's land beyond the "center of the ditch") to upend, roll up and destroy Litten's electric fence.

In both Litten and Fly, Plaintiffs filed Complaints with the respective Boards of Supervisors shortly after the events recorded above. Mr. Litten filed within a few months of Mr. Lott's "invasion." Mr. Fly filed within six (6) months of asking the Board of Supervisors the basis on which they claimed ownership of CR 161, or for "just compensation" in the alternative.

Litten appealed the Board's decision to state circuit court. The Complaint was dismissed as untimely, but upon reconsideration, authority was given by the state court to file an "Inverse Condemnation" suit. Thereafter, the federal Complaint was filed and the state proceeding was dismissed with prejudice. See Long V. Mckinney, 897 So.2d 160, 172 (Miss.

2002), for the proposition that once a court of competent jurisdiction has a case before it, no other court may intervene. Hence, dismissal with prejudice of the state suit was appropriate, if the District Court had jurisdiction.

Both cases allege that the land taken was taken for private purposes. The motions for summary judgment in both cases made no attempt to challenge these allegations. In Fly the trial court correctly asserts that these issues were not properly briefed as neither side cited the elements of "private taking." Nevertheless, the trial court assumed Defendants' Rule 56 burden and granted summary judgment.

Nor did the trial court address Plaintiffs' claims of "temporary taking" under General Motors, Loretto, or Lumas, (all cited infra), asserting to the contrary that "trespass" is a state issue exclusively. With great respect, this is plain error. Such a taking of small amounts of land may also be a violation of the Fourth Amendment's warrantless seizure protections. If the counties took sides in neighborhood issues, as alleged in both Complaints, First Amendment rights of association may be implicated. All of these theories were pled in the courts below.

Both of these suits were brought under 42 USCA § 1983, claiming constitutional torts under the U.S. Constitution. While Litten pursued compensation in the state court by appealing the Board's denial of compensation, the effort was sabotaged by Grenada County. Grenada County Attorney Jay Gore sent notice of the Grenada Board's "decision" rendered

December 11, 2007, by telefax at 4:45 p.m. on Christmas Eve, 2007. Mississippi law permits appeal of Board actions only if the appeal is noticed within twenty (20) days.

Fly, admittedly, never sought state court relief. Both Fly and Litten, have clearly exhausted all administrative remedies, if such exhaustion is pertinent. Hence only the "state judicial exhaustion" requirement is at issue.

ARGUMENT

Petitioners assert that Williamson County's ripeness requirements apply only to regulatory takings. In the alternative, they assert that they fall within the "per se," "physical invasion," or Loretto exception to the Williamson County ripeness rules.

Appellants are entitled, as Justice Connor contended, to continue this action under the "permanent physical invasion" rule of Loretto v. Teleprompter Manhatten CATV Corp., 458 US 419 (1982), cited at Lingle v. Chevron, 544 US 528, 538 (2005). Alternatively, Appellants assert that they are entitled to bring the action, as they have, under § 1983, as a constitutional tort claim, in federal fora not as an Inverse Condemnation claim in state court. See Justice Scalia's concurring opinion in Monterey v. Del Monte Dunes at Monterey, 526 U.S. 687, 727-28 (1999).

The sole issue presented for analysis concerns the applicability of the ripeness rules of Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) (hereinafter Williamson County), to a § 1983 suit to remedy a "physical taking" "per se taking," or "categorical tak-

ing." Petitioners assert five arguments for the granting of a Writ of Certiorari in this case:

1. Ripeness considerations were never intended to apply to cases of "physical taking."

2. The Circuits are split on the question.

3. The exceptions to Williamson County, especially Loretto v. Teleprompter Manhatten CATV Corp., 458 US. 419 (1982), clearly take "physical takings" outside of ripeness considerations.

4. The Congress of the United States intended for the Civil Rights Act of 1866 to protect against the taking of land without compensation under color of law by the State and its lesser entities.

5. Scholars of no less eminence than the former Chief Justice of the United States Supreme Court and Mr. Justice Brennan have stated well-reasoned opinions in opposition to the "ripeness" rules of Williamson County.

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The ripeness considerations of Williamson County were never intended to apply to "physical, per se, or categorical takings." We begin with Williamson County, ¶ 35.

[35] We granted certiorari to address the ques-

tion whether Federal, State, and local Governments must pay money damages to a landowner whose property allegedly has been "taken" temporarily by the application of government regulations. 469 U.S. 815 (1984). Petitioners and their *amici* contend that we should answer the question in the negative by ruling that government regulation can never effect a "taking" within the meaning of the Fifth Amendment. They recognize that government regulation may be so restrictive that it denies a property owner all reasonable beneficial use of its property, and thus has the same effect as an appropriation of the property for public use, which concededly would be a taking under the Fifth Amendment. id., (Emphasis supplied).

The Court further underlines the distinction in paragraphs 39-41:

[39] As the Court has made clear in several recent decisions, a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.

Throughout the rest of Williamson, viewing the case through the clear lens of the "Physical/Regulatory" dichotomy, the Court continues its careful use of language, limiting the ruling to "Regulatory Taking."

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In Palazzolo v. Rhode Island, 533 U.S. 606 (2001), The Court makes the distinction explicit:

> The Takings Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226 (1897), prohibits the government from taking private property for public use without just compensation. The clearest sort of taking occurs when the government encroaches upon or occupies private land for its own proposed use. Our cases establish that even a minimal "permanent physical occupation of real property" requires compensation under the Clause. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427(1982). In Pennsylvania Coal Co. v. Mahon, 260 U.S. 393(1922), the Court recognized that there will be instances when government actions do not encroach upon or occupy the property yet still affect and limit its use to such an extent that a taking occurs. In Justice Holmes' well-known, if less than self-defining, formulation, "while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking." Id., at 415.

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In Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985), the Court explained the requirement that a takings claim must be ripe.

The Court held that a takings claim challenging the application of land-use regulations is not ripe unless "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." Id., at 186. A final decision by the responsible state agency informs the constitutional determination whether a regulation has deprived a landowner of "all economically beneficial use" of the property, see Lucas, supra, at 1015, or defeated the reasonable investment-backed expectations of the landowner to the extent that a taking has occurred, see Penn Central, supra, at 124. These matters cannot be resolved in definitive terms until a court knows "the extent of permitted development" on the land in question. MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 351 (1986). Drawing on these principles, the Rhode Island Supreme Court held that petitioner had not taken the necessary steps to ripen his takings claim... .

Further, and more directly on point:

Direct condemnation, by invocation of the State's power of eminent domain, presents different considerations from cases alleging a taking based on a burdensome regulation. In a direct condemnation action, or when a State has physically invaded the property without filing suit, the fact and extent of the taking are known. In such an instance, it is a general rule

of the law of eminent domain that any award goes to the owner at the time of the taking, and that the right to compensation is not passed to a subsequent purchaser. See Danforth v. United States, 308 U.S. 271, 284 (1939); 2 Sackman, Eminent Domain, at § 5.01[5][d][I] ("It is well settled that when there is a taking of property by eminent domain in compliance with the law, it is the owner of the property at the time of the taking who is entitled to compensation"). A challenge to the application of a land-use regulation, by contrast, does not mature until ripeness requirements have been satisfied, under principles we have discussed; until this point an inverse condemnation claim alleging a regulatory taking cannot be maintained. It would be illogical, and unfair, to bar a regulatory takings claim because of the post-enactment transfer of ownership where the steps necessary to make the claim ripe were not taken, or could not have been taken, by a previous owner. Id.

Next, the Supreme Court in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002), gives this description at Part IV:

> The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. [Em-

phasis Added].

When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, United States v. Pewee Coal Co., 341 U.S. 114, 115 (1951), regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof. Thus, compensation is mandated when a leasehold is taken and the government occupies the property for its own purposes, even though that use is temporary. United States v. General Motors Corp., 323 U.S. 373 (1945); United States v. Petty Motor Co., 327 U.S. 372 (1946). Similarly, when the government appropriates part of a rooftop in order to provide cable TV access for apartment tenants, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); or when its planes use private airspace to approach a government airport, United States v. Causby, 328 U.S. 256 (1946), it is required to pay for that share no matter how small.

This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a "regulatory taking,"(fn18) and vice versa. For the same reason that we do not ask whether a physical appropriation advances

ask whether a physical appropriation advances a substantial government interest or whether it deprives the owner of all economically valuable use, we do not apply our precedent from the physical takings context to regulatory takings claims. Land-use regulations are ubiquitous and most of them impact property values in some tangential way - often in completely unanticipated ways. Treating them all as per se takings would transform government regulation into a luxury few governments could afford. By contrast, physical appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights.(fn19) "This case does not present the 'classi[c] taking' in which the government directly appropriates private property for its own use," Eastern Enterprises v. Apfel, 524 U.S. 498, 522 (1998); instead the interference with property rights "arises from some public program adjusting the benefits and burdens of economic life to promote the common good," Penn Central, 438 U.S., at 124. Id., (Emphasis Supplied)

The Circuits are split on the question. See Supreme Court Rule 10 (a) and (c).

There is no cavil that the interpretation of the Fifth Amendment, as applied to the states by the Fourteenth Amendment is a matter of the first importance. Chicago, Burlington & Quincy R. R. Co. v. City of Chicago, 166 U.S. 226 (1897).

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There is no cavil that the interpretation of the Fifth Amendment, as applied to the states by the Fourteenth Amendment is a matter of the first importance. Chicago, Burlington & Quincy R. R. Co. v. City of Chicago, 166 U.S. 226 (1897).

The split in the Circuits causes the application

of the Fifth Amendment to the states to depend not on law, but on geography. Since uniformity of constitutional interpretation is crucial to a healthy federalism, this case takes on great importance. Petitioners urge this Court to grant certiorari.

The Fifth Circuit is in a distinct minority among the circuits. The Fifth circuit is joined in the minority by the Seventh and Eleventh Circuits in requiring "state judicial exhaustion" in a physical takings case. The applicable holdings for the Fifth Circuit are Severance v. Patterson, 566 F.3d 490 (5th Cir.2009) and Urban Developers LLC v. City of Jackson, 468 F.3d 281 (5th Cir.2006); the Seventh Circuit similarly opines in Greenfield Mills v. Macklin 361 F.3d 934 (7th Cir.2004); as does the Eleventh Circuit in Alabama Power Co. v. FCC, 311 F.3d 1357 (11th Cir.2002) and Gulf Power Co., 187 F.3d 1324 (11th Cir.1999).

All other Circuits have honored the Williamson County physical/regulatory distinction:

First Circuit - Franklin Memorial Hosp. v. Harvey, 575 F3d 121 (1st Cir.2009);

Second Circuit - Cablevision Systems Corp. v. FCC, 570 F3d 83 (2d Cir. 2009);

Third Circuit - Pinewood Estates of Michigan v. Barnegat Township Leveling Board, 898 F2d 397 (3d Cir. 1990), (overruled on different grounds by Yee v. City of Escondido, 503 U.S. 519 (1992);

Fourth Circuit - Sunrise Corp. of Myrtle Beach v. City of Myrtle Beach, 420 F3d 322 (4th Cir.2005);

Sixth Circuit - Tennessee Scrap Recyclers Ass'n v. Bredeson, et al, 556 F3d 442 (6th Cir.2009);

Eighth Circuit - Hawkeye Commodity Promotions v. Vilsack, et al, 486 F 3d 430 (8th Cir.2007);

Ninth Circuit - McClung v. City of Sumner, 548 F.3d 1219 9th Cir.2008);

Tenth Circuit - Ramsey Winch Inc. v. Henry, 555 F.3d 1199 (10th Cir.2009);

Federal Circuit - Casitas Municipal Water District v. U.S., 556 F.3d 1329 (Fed Cir.2009); and D.C. Circuit - Building Owners & Managers Ass'n v. FCC, 254 F.3d 89 (D.C. Cir.2001) (distinction recognized, but not pertinent).

As to the geographical distribution of the various opinions, the Seventh Circuit is the only exception to a "deep South" minority. It cannot be gainsaid that this geographic pattern parallels, (albeit imprecisely), the two circuits that comprise most of the seceding states of the old Confederacy, which states historically renounced federalism in favor of a radical states' rights stand. However, Petitioners do not assert a causal connection, being aware of the fallacy "POST HOC ERGO PROPTER, ¶ HOC."

The split in the Circuits on such a crucial issue as interpretation of the Fifth Amendment's Takings Clause would by itself justify the granting of certiorari. In addition to the pronouncements of Williamson County, however, stare decisis allegiance to Loretto

v. Teleprompter Manhatten CATV Corp., 458 US 419 (1982), (hereinafter, "Loretto"), is called into play as well.

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The Loretto exception for "physical taking," no matter how small, is key to the issue of "ripeness" and, hence, jurisdiction. As Justice O'Connor pointed out in her introductory paragraph to Yee v. City of Escondido, op cit at 522-23:

> The Takings Clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation." Most of our cases interpreting the Clause fall within two distinct classes. Where the government authorizes a physical occupation of property (or actually takes title), the Takings Clause generally requires compensation. See e.g., Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426, 102 S.Ct. 3164,3171, 73 L.Ed.2d 868 (1982). But where the government merely regulates the use of property, compensation

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> is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole. See, e.g., Penn Central Transp. Co. V. New York City, 438 U.S. 104, 123-125, 98

S.Ct. 2646, 2659, 57 L.E.d.2d 631 (1978). The first category of cases requires courts to apply a clear rule; the second necessarily entails complex factual assessments of the purposes and economic effects of government actions.

The application of the Fifth Amendment to the states through the Fourteenth Amendment is crucial to our analysis. This High Court has gone well out of its way to validate Loretto twenty-three times. This validation by citation includes the application to the states. See Loretto at 427.

In the cases at bar, Petitioner Litten was subjected to destruction of a fence on an unpurchased "right of way" lien. He additionally suffered the destruction of crops by the spraying and drift of potent pesticides to the alleged "right of way."

Petitioner Fly was quite literally subjected to a "physical invasion" as well. Yalobusha County sent in a small army of heavy machines with their operators to "rebuild" the last 300 yards of an old gravel road. Fly contends that the County took the wrong 300 yards, using a logging road built by Petitioner's brother instead of the original roadbed. Fly was also required to remove a cabin from the unpurchased "right of way." Several tons of gravel were permanently left on Fly's land. His right to prohibit entry to the "builders" or any other public driver was also taken, since the road lying exclusively on Fly's land ended at his most distant boundary from its origin.

Fly's plight was complicated by the representation of Fly's benefitting neighbors by the attorney for the Board of Supervisors. The benefitting client had the privilege of a "drive-way" to her property, (she had other means of ingress and egress), without the continuance of the historic road thereon. Other local land-owners had requested maintenance of the road as early as the 1970's, to no avail, leading Fly to claim preferential treatment for the Board attorney's private clients. This patent preferential treatment further led to a claim of "taking" for private purpose in violation of the Fifth Amendment. The land taken, 300 yards at the boundary of Fly's property and a claimed fifty-foot right of way along the length of the road, constitute a permanent occupation under Loretto at 430.

Similarly, Litten is unable to prevent Grenada County from spraying pesticides near his organic crops or to protect those crops by placing a fence on the "right of way." Hence, a long narrow right of way is "permanently occupied" by the County.

As Justice Marshall said in summary of near contemporaneous cases by the High Court:

> Although this Court's most recent cases have not addressed the precise issue before us, they have emphasized that physical invasion cases are special, and have not repudiated the rule that any permanent physical occupation is a taking. The cases state or imply that a physical invasion is subject to a balancing process, but they do not suggest that a permanent physical occupation would ever be exempt from the Takings Clause.

Loretto, at 432. Similarly:

> In short, when the "character of the governmental action," Penn Central, 438 U.S. at 124, is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to

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Page 435

> whether the action achieves an important public benefit or has only minimal economic impact on the owner. Id. 434-35

In Fly's case, the "occupation" is patent. In Litten's case, the continuing use of the right of way by the County by spraying and by dictating what may or may not be erected on his land are equally confiscatory.

It should be noted in closing this argument that the Fifth Circuit has never, except under the compulsion of this Court's mandate, given controlling authority to Loretto vis-a-vis "physical taking" jurisprudence. Petitioners find one mandated citation in Washington Legal Fdtn. v. Texas Equal Access to Justice Fdtn., 270 F.3d 180 (5th Cir.2001). Other than the IOLTA case, the Fifth Circuit has cited Loretto in one criminal case, US v. Salvatore, 110 F.3d 1131 (5th Cir.1997); in an irrelevant footnote in Texas Manufactured Housing Ass'n v. City of Nederland, 101 F.3d 1095 (Cir.1996), an opinion written by a District Judge setting by designation; and in dicta discussing the "character of government action." The "takings" claim was decided

on the basis that there "was no taking." Loretto was distinguished as applying only to "permanent physical occupation of property," not to the ordinance in question. Further, the takings claim was dismissed as unripe under Williamson County. Samaad v. City of Dallas, 940 F.2d 925 (5th Cir.1991).

That is the extent of the Fifth Circuit's citation of Loretto. The Eleventh and Seventh Circuits analysis of Loretto is similarly sparse. In fairness, however, the Third Circuit has rarely addressed Loretto, though supporting the doctrine for which it stands.

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Congress intended the Civil Rights Act of 1866 to extend to the taking of land without just compensation under color of state law. In Section 1 of the original act, Congress specifically included the right "to inherit, purchase, lease, sell, hold, and convey real and personal property... any law statute, ordinance, regulation, or custom, to the contrary notwithstanding." Civil Rights Act of 1866, Section 1. Section 3 of the same Act gives the district and circuit courts of the United States "exclusive" jurisdiction over "offenses committed against the provisions of this act...." Section 10 authorizes appeal to the Supreme Court of the United States.

More recently, in Younger v. Harris, 401 US 37 (1971), the Supreme Court restated that § 1983 suits require no exhaustion of state remedies. See fn.5. The single exception to this rule has been applied in recent years since the passage of the Prison Litigation Reform Act of 1995.

See Woodford v. Ngo, 548 US 81, 93(2006).

Also of recent vintage is Justice Kennedy's opinion in City of Monterey v. Del Monte Dunes, 526 US 687 (1999). The primary question in Del Monte Dunes was whether, and under what circumstances, a § 1983 suit was amenable to jury decision. The answer was based on a finding that the issue of finality had been accomplished as a result of repeated efforts by Del Monte Dunes to reach a reasonable development plan for its efforts, all such efforts being rebuffed by the state.

While it is true that Del Monte Dunes is a "regulatory taking" action based on a lack of California law for temporary regulatory takings, the language used by Justice Kennedy to characterize the nature of the claim is instructive. It is important to note the Williamson County conclusion that a "physical taking" is different because it already partakes of finality as to the amount of damage caused. See Palazzolo v. Rhode Island, 533 US 606, 617 (2001), (also written by Justice Kennedy).

Justice Kennedy, in Del Monte Dunes, at 710-11, opines:

> Here Del Monte Dunes sought legal relief. It was entitled to proceed in federal court under § 1983 because, at the time of the city's actions, the State of California did not provide a compensatory remedy for temporary regulatory takings. See First English, 482 U.S., at 308-311. The constitutional injury alleged, therefore,

is not that property was taken but that it was taken without just compensation. Had the city paid for the property or had an adequate post-deprivation remedy been available, Del Monte Dunes would have suffered no constitutional injury from the taking alone. See Williamson, 473 U.S., at 194-195. Because its statutory action did not accrue until it was denied just compensation, in a strict sense Del Monte Dunes sought not just compensation per se but rather damages for the unconstitutional denial of such compensation. Damages for a constitutional violation are a legal remedy. See, e. g., Teamsters v. Terry, 494 U.S. 558, 570 (1990) ("Generally, an action for money damages was 'the traditional form of relief offered in the courts of law' ") (quoting Curtis, 415 U.S., at 196).

This difference renders the analogy to condemnation proceedings not only unhelpful but also inapposite. When the government takes property without initiating condemnation proceedings, it "shifts to the landowner the burden to discover the encroachment and to take affirmative action to recover just compensation." United States v. Clarke, 445 U.S. 253, 257 (1980). Even when the government does not dispute its seizure of the property or its obligation to pay for it, the mere "shifting of the initiative from the condemning authority to the condemnee" can place the landowner "at a significant disadvantage." Id., at 258; cf. id., at 255 ("There are important legal and practical differences between an inverse condemnation suit and

a condemnation proceeding"); 84 Stat. 1906, § 304, 42 U.S.C. § 4654 (recognizing, at least implicitly, the added burden by providing for recovery of attorney's fees in cases where the government seizes property without initiating condemnation proceedings but not in ordinary condemnation cases). Id, at 712.

At the risk of repetition, Petitioners repeat the physical/regulatory distinction. The finality of the taking in the instant case is patent. The counties are not giving the land back, and they have no intention of granting "just compensation" to Petitioners. Hence, the Court's § 1983/condemnation distinction brings the case at bar within the "constitutional tort" remedies of §1983.

Finally, as to this argument, there is the well-reasoned concurrence of the late Chief Justice Rehnquist in San Remo Hotel v. City and Conty of San Francisco, 545 US 323, 348-52 (2005). While Petitoners will analyze the concurrence at more length in the fifth and final argument, for purposes of this discussion one sentence at p. 349 will suffice. "It is not obvious that either constitutional or prudential principles require claimants to utilize all state compensation procedures before bringing a federal takings claim."

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Williamson County's ripeness requirements have engendered controversy from their origin. Though the case at bar does not require a thorough review of the doctrine, the Court here has the

opportunity to correct one of the more egregious misinterpretations related to Williamson County.

While there has been substantial criticism in the scholarly community of Williamson County and its progeny, Petitioners will focus on the scholarly opinions of two of this Court's great minds, Former Chief Justice Rehnquist and Former Justice Brennan. The late Chief Justice, of course, suggested revisiting Williamson County ripeness standards in his concurrence in San Remo Hotel, joined by Justices O'Connor, Kennedy and Thomas. The former Chief Justice begins by outlining the Williamson County requirements and reminding his colleagues that while Williamson County was purported to draw its holding from the Fifth Amendment, "ripeness" standards are not intrinsic to the Amendment. However, in Suitum v. Tahoe Regional Planning Agency, 520 US 725, 733-734 (1997), the exhaustion requirements both administrative and state judicial exhaustion were called "prudential."

Chief Justice Rehnquist criticizes the "judicial exhaustion" requirement's being analogized to state tax issues. See Fair Assessment in Real Estate Ass'n v. McNary, 454 US 100 (1981). His objection is based on a lack of a history of comity with state courts on Fifth Amendment controversies. "In any event, the Court has not explained why we should hand authority over federal takings claims to state courts, based simply on their relative familiarity with local land-use decisions and proceedings, while allowing plaintiffs to proceed directly to federal court in cases involving, for example, challenges to municipal land-use regulations based on the First Amendment, [internal cites omitted]..., or the Equal Protection Clause,

[internal cites omitted].... In short, the affirmative case for the state-litigation requirement has yet to be made." Id, at 350-351.

He further attacks the "state-litigation requirement" as creating "anomolies." He acknowledges that the constitutionally protected right to "just compensation" cannot effectively even be brought in federal court.

He sees no reason "why federal takings claims in particular should be singled out to be confined to state courts, in the absence of any asserted justification or congressional directive." Id, at 351.

Finally, the distinguished jurist concludes with a plea for the Court to revisit Williamson County in an appropriate case. His particular focus is on the "state litigation," the essential issue in the case at bar.

This case provides an opportunity for this Court to revisit Williamson County, at least to clarify whether the state litigation requirement applies to physical takings. Petitioners pray that the Court will take this opportunity to review Williamson County. Petitioners are proud to be in the company of no less eminent a legal mind than that of the former Chief Justice.

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Petitioners would make one final argument before closing. This argument is no more than a different lens from which to view a takings claim. The argument comes from Justice Brennan's dissent in San

Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621, 654 (1981). The different approach suggested by Justice Brennan is easily summarized in his own words. " the Fifth Amendment is not precatory; once there is a 'taking' compensation must be awarded." As authority for this position, Justice Brennan cites Jacobs v. United States, 290 US 13(1933).

This new lens certainly supports Justice Kennedy's Del Monte Dunes distinction between eminent domain and Section 1983 suits. If further supports his contention that "Del Monte Dunes sought not just compensation per se but rather damages for the unconstitutional denial of such compensation." Del Monte Dunes op cit, at p.710.

In the case at bar, this critical point is well-illustrated. In the Litten cause, Litten had previously been subjected to an unconstitutional taking and was vindicated by the District Court. Additionally, he was engaged in a dispute with a neighbor who requested that the Supervisor in their Beat remove Litten's fence. Hence, in addition to "just compensation." Litten sought damages for the destruction of the fence as well as the "taking " claim. He further seeks damages for the insult.

Petitioner Fly claims a private taking by the county for the benefit of the County Attorney's private client. In addition, he actually suffered a "physical invasion" by a team of public road builders who left the strips of land taken "permanently occupied." In this regard, he was required by the county to remove a cabin from "the county's right-of-way."

Both Litten and Fly have suffered the uncompensated loss of their authority to exclude third parties from the parcels taken. Under Mississippi law, in fact, by continual use of a public right of way or easement, a third party may obtain a private easement in his or her own right, even if the public easement has been abandoned. See Ann May Enterprises, Inc. v. Caples, 724 So.2d 1187 (Miss. App.1998). Hence, the stakes are heightened, particularly as to Petitioner Fly, who bears the sole burden of a public road through his land only, for the sole benefit of his abutting neighbor. Mr. Litten, as a practical matter has lost a fence, all protection of his crops against (third party?) intruding deer, and loss of his ability to prevent third parties from parking along his boundary on both sides of the road.

The land of both petitioners having been taken without just compensation by physical occupation, their right to compensation is not precatory, it is mandatory. Since the extent of the "taking" can be easily defined, the rationale of Williamson County as to the physical/regulatory distinction places the actions under federal jurisdiction to enforce the mandate of the U.S. Constitution.

Appellants urge that the question of "judicial exhaustion," is a misunderstanding of the "non-precatory" nature of the Fifth Amendment. This misunderstanding is clearly addressed in the clear language in Palazallo v. Rhode Island, 533 U.S. 606,628 (2001):

"In a direct condemnation action, or when a State has physically invaded the property without

filing suit, the fact and extent of the taking are known. A challenge to the application of a land-use regulation, by contrast, does not mature until ripeness requirements have been satisfied, under principles we have discussed; until this point an inverse condemnation claim alleging a regulatory taking cannot be maintained."

The same question as to the precatory nature, vel non, of the Takings Clause is addressed in Justice Stephens' dissent in Palazzallo in which he takes the argument a step farther. His conclusion is that due to the "taking" having occurred upon passage of the questioned regulation, the damage is already done and must be paid with or without administrative or state judicial exhaustion. This dissent is not supported by any other jurist, perhaps because it seeks to diminish the Physical/Regulatory distinction, most particularly the Williamson ruling, requiring exhaustion of administrative and judicial processes for "regulatory" takings. See also: Tahoe-sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 US 302, 321-23 (2002).

The distinction between physical and regulatory takings cases has existed since at least 1922. Williamson County did more to widen the gap between the two than any other case from the High Court. The current trend is to re-unite the two poles, at least in certain per se, or categorical regulatory contexts, permitting initial federal jurisdiction once a taking has occurred. As to "physical takings," with all respect, Appellants assert that the law has not changed since 1897 when the Supreme Court acknowledged the application of the Fifth Amendment to the states through the Fourteenth Amendment.

CONCLUSION

For all of the reasons outlined above and for others to be presented at argument (if permitted), Petitioners pray for grant of a Writ of Certiorari to the Fifth Circuit. And Petitioners pray for general relief.

Respectfully Submitted this 27 day of JULY, 2010.

LAWRENCE LITTEN

FLETCHER FLY

BY: /s/ _____

STEWART GUERNSEY,
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P.O. BOX 167
WATER VALLEY, MS 38965
(662) 229-7577

IN THE SUPREME COURT OF THE UNITED STATES

LAWRENCE LITTEN PETITIONER

VS

GRENADA COUNTY, MISS., ET AL. RESPONDENT

SUPREME COURT CAUSE NO._____

FLETCHER FLY PETITIONER

VS

YALOBUSHA COUNTY, MISS. RESPONDENT

CERTIFICATE OF SERVICE

I, Stewart Guernsey, attorney for the Petitioner's, do hereby certify that I have this date served via United States Mail, postage prepaid, a true and correct copy of the above and foregoing Petition for Writ of Certiorari to the Fifth Circuit Court of Appeals on the following persons:

Michael Wolfe, Esq.
P.O. Box 1163
Jackson, MS.

John Crow
203 Wagner St.
Water Valley, MS. 38965

This the 27 day of JULY, 2010.

/s/

STEWART GUERNSEY

STATE OF MISSISSIPPI
COUNTY OF TALLAHATCHIE

Sworn to and subscribed before me this 27 day of JULY, 2010.

/s/
NOTARY PUBLIC

MY COMMISSION EXPIRES

IN THE SUPREME COURT OF THE
UNITED STATES

LAWRENCE LITTEN PETITIONER

VS

GRENADA COUNTY, MISS., ET. AL, RESPONDENT

SUPREME COURT CAUSE NO._____

FLETCHER FLY PETITIONER

VS

YALOBUSHA COUNTY, MISS. RESPONDENT

CERTIFICATE OF LENGTH

I, STEWART GUERNSEY, do hereby Certify that the Petition for Writ of Certiorari to the Fifth Circuit Court of Appeals herein contains 6,672 words.

/s/

STEWART GUERNSEY

STATE OF MISSISSIPPI
COUNTY OF TALLAHATCHIE

This the 27 day of JULY, 2010.

/s/

NOTARY PUBLIC

MY COMMISSION EXPIRES

Supreme Court, U.S.
FILED

10-494 MAY 21 2010

OFFICE OF THE CLERK

172

IN THE

SUPREME COURT OF THE UNITED STATES

LAWRENCE LITTEN — PETITIONER

VS.

GRENADA COUNTY,MISSISSIPPI,ET. AL. — RESPONDENT

SUPREME COURT CAUSE NO. _____

FLETCHER FLY — PETITIONER

VS.

YALOBUSHA COUNTY, MISSISSIPPI — RESPONDENT

APPENDIX

PREPARED AND SUBMITTED BY:
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P.O. BOX 167
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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 09-60463
SUMMARY CALENDAR

LAWRENCE LITTEN,
PLAINTIFF-APPELLANT,

Versus

GRENADA COUNTY, MISSISSIPPI;
MICHAEL LOTT, In his official and personal capacities,

DEFENDANT-APPELLEES.

****

NO. 09-60502
SUMMARY CALENDAR

FLETCHER FLY
Plaintiff-Appellant,

Versus

YALOBUSHA COUNTY, MISSISSIPPI,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
NO. 3:07-CV-91

Before DAVIS, SMITH, and DENNIS,
Circuit Judges.

PER CURIAM:

Lawrence Litten and Fletcher Fly appeal a summary judgment dismissing their physical takings claims for lack of ripeness. The two cases in this consolidated appeal have no mutual parties or shared factual circumstances, yet both present the threshold issue of whether the ripeness requirement in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), applies to claims of physical takings. We recently held that it does. See *Severance v. Patterson*, 566 F.3d 490, 496-97 (5th Cir.2009)(citing *Urban Developers LLC v. City of Jackson, Miss.*, 468 F.3d 281, 294-95 (5th Cir. 2006)). The district court therefore properly dismissed both claims as unripe, and we AFFIRM.

I.

The district court held that Litten and Fly had not sought or been denied just compensation, under available state procedures, for the alleged takings. Citing *Williamson*, the court held plaintiffs' claims to be unripe. Litten and Fly argue that *Williamson's* ripeness rule applies only[1] to regulatory takings and is inapplicable to their case. They recognize that our holding in *Severance* directly contradicts their assertion,, but they argue that it was wrongly decided. That argument is foreclosed, because "one panel of this court cannot overrule the decision of another panel." *Lowrey v. Tex. A&M Univ.* Sys., 117 F.3d 242, 247 (5th Cir. 1997).

Fly further asserts that the alleged takings violate the Public Use Clause. As an initial matter, a taking has not been established in either case. Even if we were to assume a taking, there has been no violation of the Public Use Clause. The land at issue is either a public road or the adjoining cartilage or right of way. "A taking of property for a highway is a taking for public use [that]has been universally recognized, from time immemorial." *Rindge Co. v. Los Angeles County*, 262 U.S. 700, 706 (1923). The public road and cartilage contain a water line and utility lines. Utility companies use the road to service and repair the transmission lines. The water and utility lines serve Fly's neighbors. A taking of property for public utility

[1] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

and water lines, like public highways, unquestionably satisfies the public use requirement of the Takings Clause.

There remain disputed issues of fact, but none is material. Fly argues that a part of the public road adjoining his property washed out several years age, that the county neglected to repair it, and that the property was therefore abandoned and reverted to him. But until there is a denial of just compensation, there is no takings claim. *Williamson*, 473 U.S. at 195. Because plaintiffs' claims are unripe, we cannot address their substance.

Accordingly, the summary judgments, dismissing plaintiffs' claim for lack of ripeness, are AFFIRMED. We also AFFIRM the summary judgment as to Fly's private takings claim. All pending motions are DENIED. [2]

[2] Appellants' motion to strike the name of Honorable Thomas U. Reynolds from the response brief of Yalobusha County as an interested person is DENIED. Appellants' motions for sanctions against attorney John J. Crow, Jr., and for award of attorney fees are DENIED. Appellee Yalobusha County's motion for attorney fees and the motion for disciplinary action against R. Stewart Guernsey are also DENIED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-60502
Summary Calendar

D.C. Docket No. 3:08-CV-8

FLETCHER FLY,
Plaintiff-Appellant

v.

YALOBUSHA COUNTY, MISSISSIPPI,
Defendant-Appellee

Appeal from the United States District Court for the Northern District of Mississippi, Oxford

Before DAVIS, SMITH, and DENNIS, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this court.

ISSUED AS MANDATE:

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

LAWRENCE LITTEN PLAINTIFF

v. CIVIL ACTION NO. 3:07CV91

GRENADA COUNTY, MISSISSIPPI, MICHAEL LOTT, In His Official and Individual Capacities And JOHN DOES, 1-5 DEFENDANTS

ORDER

This cause comes before the court on the motion of defendants Grenada County and Michael Lott for summary judgment, pursuant to Fed. R. Civ. P. 56. Plaintiff Lawrence Litten has responded in opposition to the motion, and the court, having considered the memoranda and submissions of the parties, concludes that the motion is well taken and should be granted.

On July 17, 2007, plaintiff filed this action against defendants Grenada County, Mississippi, and Michael Lott, alleging that his rights were violated in relation to the public use of Hebron Church Road, which runs through portions of his land. In particular, plaintiff complains of defendants' actions in having allegedly removed an electric fence adjacent to the road, which plaintiff claims resulted in deer eating his muscadine crop. Prior to filing the instant action, plaintiff filed suit in the Circuit Court of Grenada County, making essentially the same allegation as he makes here. The circuit court dismissed the action on May 8,

2007, although it later clarified that the dismissal was without prejudice to plaintiff bringing a subsequent inverse condemnation claim.

In light of the circuit court's ruling, it seems clear (as this court has noted in a prior order) that the sole claims which are properly before it are plaintiff's inverse condemnation claims. In opposing summary judgment, plaintiff appears to concede that this is the case, although he does assert at one point that his trespass claims are properly before this court. Even if this court were to accept this assertion as true, the parties here are all Mississippi residents, and trespass claims clearly do not arise under federal law. Thus, the sole basis for federal jurisdiction in this case are plaintiff's federal inverse condemnation claims, and, as explained below, these claims are not yet ripe.

While inverse condemnation claims may be brought under either state or federal law, the U.W. Supreme Court emphasized in *Williamson County Reg'1 planning Comm'n v. Hamilton bank of Johnson City*, 473 U.S. 172, 105 S.Ct. 3108, 3119, 87 L.Ed.2d 126 (1985), that a federal takings claim does not ripen until just compensation is denied. Therefore, for a federal takings claim to become ripe, the plaintiff is required to seek compensation through the procedures the state has provided, unless those procedures are unavailable or inadequate. *Id, at 3120-22.* See also *Samaad v. City of Dallas*, 940 F.2d 925, 933 (5th Cir. 1991); *Coleman v. Carroll County*, 2005 WL 2133678 (N.D. Miss.2005). In *Liberty Mut. Ins. Co. v. Brown*, 380 f.3d 793, 798 (5th Cir.2004), the Fifth Circuit held that where a plaintiff "failed to present its inverse condemnation action to the state court in a pos-

ture such that the state court could rule on the merits of [its] claim, [it] had failed to utilize the available state procedures for obtaining compensation" within the meaning of *Williamson*. In this case, plaintiff did, to reiterate, file a state court complaint asserting inverse condemnation claims, but he obtained no actual ruling from the circuit court regarding the merits of those claims.

The record indicates that the circuit court issued two cursory orders dismissing plaintiff's state court complaint, but neither order addressed the merits of his claims. The first order, issued on May 8, 2007, merely noted that Grenada County had filed a motion to dismiss and that plaintiff had failed to attend a hearing related to that motion. The circuit court thus appeared to grant the motion to dismiss as unopposed. The circuit court's second order of dismissal, dated July 27, 2007, clarified the first order and emphasized that the action was dismissed "without prejudice to be brought again as an Inverse Condemnation proceeding only." At the time this second order was entered, plaintiff had already filed the instant federal court action ten days previously, but, even if he had not, it would still be apparent that he had not obtained a ruling on the merits of his inverse condemnation claim within the meaning of *Brown and Williamson*. It is thus apparent that any federal inverse condemnation claims which plaintiff might have are not yet ripe.

This court's conclusion in this regard is strengthened by the 2005 decision of *Oliver v. Lafayette County, Miss.*, 2005 WL 1657134 (N.D.Miss.2005), where Judge Davidson concluded that a plaintiff had failed to exhaust his remedies where he was still involved in

state court litigation at the time he had filed his federal inverse condemnation action. In so concluding, Judge Davidson wrote as follows:

> The Mississippi Supreme Court, in *Runge v. Necaise Constr. Co., Inc.*, 467 So.2d 666 (Miss.1985), held that property owners asserting inverse condemnation claims are to use the following procedure in asserting their claims in the state courts of Mississippi: first, in cases where a county is the responsible authority (as is asserted here), a petition for compensation is to be filed with the county Board of Supervisors pursuant to Section 65-7-61 of the Mississippi Code. Failure to file such a petition, however, is not fatal to a landowner's claim, and such claims can be presented through an action in state circuit court, which is the second and final step in the procedure. *Runge*, 467 So.2d 666 at 668-69.
>
> In the case sub judice, the Plaintiff makes no credible argument that the State of Mississippi's just compensation procedures are unavailable or inadequate. Regarding those procedures, the Plaintiff did not file a petition for compensation with the Lafayette County Board of Supervisors; he has, however, filed a pending state court action against the University of Mississippi and the State of Mississippi. As the Fifth Circuit made clear in *Vulcan Materials*, the requirement for a landowner to exhaust his state court remedies before filing a federal suit cannot be satisfied "by simultaneously bring[ing] federal and state takings claims" as

> the Plaintiff has done here. Vulcan Materials, 238 F.3d at 385. Instead, the Plaintiff is to first exhaust his state court remedies and then, if additional relief is ought, bring a federal court action. Here the Plaintiff has not properly exhausted his state court remedies and is still involved in state court litigation; thus, this action was filed prematurely and is properly dismissed in accordance with the Fifth Circuit's Vulcan Materials ruling.

Oliver, slip op. at 3.

In this case, plaintiff as likewise failed to exhaust his state court remedies by merely filing a state court complaint without obtaining an actual ruling on the merits of that claim. Indeed, defendants note that plaintiff had previously failed to pursue his state court remedies by failing to challenge the identification of Hebron Church Road on Grenada County's registry of public roads in 2000. Part of plaintiff's complaint in this case is that Hebron Church Road not actually a public road, but it is apparent that he failed to timely challenge the county's designation of the road as such. It is thus apparent that plaintiff failed to timely challenge the county's actions in this case, and, when he finally filed a circuit court action, he failed to obtain a ruling on the merits of his claim. Plaintiff asserted in his response to defendant's initial motion to dismiss that he acquiesced in the circuit court's July 27, 2007 order of dismissal because he "saw no harm in dismissing the state case" since jurisdiction was by that time "firmly vested" in federal court. Plaintiff fails to recognize, however, that his federal inverse condemnation/taking claim is the only jurisdictional basis for

this case being brought in federal court and that, by failing to first pursue his remedies in state court, he failed to lay the proper jurisdictional predicate for this action. This action is therefore due to be dismissed as unripe.

It is therefore ordered that defendants' motion for summary judgment is granted, and this action is hereby dismissed without prejudice.

A separate judgment will be issued this date, pursuant to Fed. R. Vic. P. 58. So ordered, this the 14th day of November, 2008.

/s/ MICHAEL P. MILLS
CHIEF JUDGE
UNITED STATES DISTRICT
COURT NORTHERN DISTRICT
OF MISSISSIPPI

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

LAWRENCE LITTEN PLAINTIFF

v. CIVIL ACTION NO.3:07CV91

GRENADA COUNTY, MISSISSIPPI, MICHAEL LOTT, In His Official and Individual Capacities and JOHN DOES, 1-5 DEFENDANTS

JUDGMENT

For the reasons given in the court's order issued this date, it is hereby ordered that this case is dismissed without prejudice.

So ordered, this the 14th day of November, 2008.

/s/ MICHAEL P. MILLS
CHIEF JUDGE
UNITED STATES DISTRICT
COURT NORTHERN DISTRICT
OF MISSISSIPPI

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

LAWRENCE LITTEN — PLAINTIFF

VS. — CIVIL ACTION NO. 3:07-CV91

GRENADA COUNTY, MISSISSIPPI, MICHAEL LOTT, in His Official Capacities and JOHN DOES 1-5 — DEFENDANTS

ORDER

Plaintiff's motion to reconsider will be denied. As this court noted in its order granting summary judgment, the Fifth circuit and Mississippi district courts have held that the Supreme Court's decision in *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S.Ct. 3108, 3119, 87 L.Ed.2d 126 (`1985) is applicable to inverse condemnation actions such as the instant one. *See, e.g. Liberty Mut. Ins. Co. V. Brown,* 380 F.3d, 793, 798, (5th Cir. 2004); Oliver v. Lafayette County, Miss., 2005 WL 1657134 (N.D. Miss. 2005). Moreover, plaintiff's argument that he did not need to first file the instant action in state court is belied by his own actions in initially doing so. The record reveals that plaintiff failed to appear at a summary judgment hearing in state court relating to his claim, and he should not be permitted to assert federal Constitutional claims when he failed to take advantage of the state court

remedies which were available to him.

If federal jurisdiction in the present context were as broad as plaintiff suggests, then it is likely that federal courts in this state would be inundated with property disputed between Mississippi residents and municipalities. This case is, in fact, a simple property dispute between a Mississippi resident and county, and Mississippi law provides plaintiff with a clear avenue for seeking compensation in this matter. It appears that plaintiff essentially gave up on pursuing this compensation in state court, and having done so, he is in no position to assert that he has been deprived of his rights under the U. S. Constitution.

It is therefore ordered that plaintiff's motion to reconsider is denied.

So ordered, this the 18th day of May, 2009.

/s/ MICHAEL P. MILLS
UNITED STATES DISTRICT
COURT NORTHERN
DISTRICT OF MISSISSIPPI

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

FLETCHER FLY — PLAINTIFF

V. — CASE NO. 3:08CV8

YALOBUSHA COUNTY, MISSISSIPPI

ORDER GRANTING SUMMARY JUDGMENT

This cause comes before the court on the motion [29] of the defendant, Yalobusha County, Mississippi, seeking summary judgment.

The plaintiff, Fletcher Fly, alleges a variety of complex facts and claims in this suit. Each o these claims relates to an alleged taking of Fly's property by the county.

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Cantrett, 477 U.S. 317, 323, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). An issue of material fact is genuine if a reasonable jury could return a verdict for the nonmovant. Anderson v. Liberty Lobby, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). In reviewing the evidence, this Court must draw all reasonable inferences in favor of the nonmoving par-

ty, and avoid credibility determinations and weighing of the evidence. Reeves v. Sanderson Plumbing Prods. Inc., 530 U.S. 133, 150, 120 S.Ct. 2097, 2110, 147 L.Ed.2d 105 (2000). In so doing, the Court must disregard all evidence favorabled to the moving party that the jury is not required to believe. Reeves, 530 U.S. at 151, 120 S.Ct. at 2110.

"[A] violation of the Takings Clause does not occur until just compensation is denied." Urban Developers LLC v. City of Jackson, Mississippi, 468 F.3d 281, 294)5th Cir. 2006). This requirement means plaintiffs must first avail themselves of the state's administrative procedures before bringing a takings claim to federal court. Id. At 294-95 (citing Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 173 (1985)).

The court in reaching its decision addresses only Fly's failure to pursue the procedures regarding takings available under Mississippi law. In 2007, Fly went before the Yalobusha County Board of Supervisors. The Board found there had been no taking of Fly's property. Mississippi law allows such a decision to be appealed to the Circuit Court. Miss. Code Ann. §11-51-75. Fly did not appeal the decision to the Circuit court. Neither did Fly bring a state law inverse-condemnation action. See Urban Developers, 468 F.3d at 295 (citing City of Gulfport v. Anderson, 554 So.2d 873, 874 (Miss. 1989). Likewise, Fly has not alleged the state law procedures are unavailable or inadequate as required under Fifth Circuit precedent. Id. (*Citing Bryan v. City of Madison, Mississippi*, 213 F.3d 267,276 n.16 (5th Cir. 2000)).

In order to ripen his claim Fly must exhaust all remedies provided for under Mississippi law. His failure to do so makes this suit premature.

The defendant's motion for summary judgment is GRANTED.

This the 19th day of February, 2009.

/s/ MICHAEL P. MILLS
CHIEF JUDGE UNITED STATES
DISTRICT COURT NORTHERN
DISTRICT OF MISSISSIPPI

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

FLETCHER FLY PLAINTIFF

V. CASE NO. 3:08CV8

YALOBUSHA COUNTY, MISSISSIPPI DEFENDANT

ORDER

This cause comes before the court on the motion [43] of the plaintiff, Fletcher Fly, to alter the court's prior entry of summary judgment.

This suit arises out of Fly's complaint that 300 yards of his property have been "invaded" by the defendant, Yalobusha County, Mississippi. It is undisputed that the property in question became a county road sometime before the early 1950's.[1] Fly came into possession of the land surrounding the road in 1994, subject to his mother's life state. At some point between when the road initially took on a public character and Fly's possession of the surrounding land, a portion of the road washed out. The County then stopped maintaining the road for a period of time. There is a dispute between the parties as to whether the wash out took place within Fly's property.

[1] The County argues this date although at least some testimony indicates the road was public as early as the 1800's.

Yalobusha County gave notice of intent to adopt an official road plan, advertising in the North Mississippi Herald and Coffeeville Courier, announcing a public hearing for June 12, 2000, all pursuant to MISS. CODE ANN. § 65-7-4 . No interested members of the public attended.1 Yalobusha County then adopted the road register and official map formally setting out all county roads. That plan lists the property in question as County Road 161, though in older times it had been known as Henry Hudson Road, and sometimes was known as Chestnut Lake Road. Bowing to modern day notions of presumed efficiency, a sign designating it as "CR 161" was erected. Thus began the present dispute.

County Road 161 runs across the Fly property and accesses properties owned by the La Gasse family, David LaGasse individually, and a collection of folk known as the Magee Hunting Club. Utility lines, serving these properties, also run along the road.

Fly asks the court to reconsider its order closing the case because he brought a claim, not previously considered, that the County taking was for private use and thus prohibited by the Fifth Amendment. This claim is based on the assertion that the County abandoned the road through his property and he came into possession of that land. He then further asserts the County took the land by including it in the 2000 road plan.

Under Federal Rules of Civil Procedure 59(e), there are three possible grounds for granting a motion for altering a court's judgment: (1) an intervening change in controlling law, (2) the availability of new evidence not previously available, and (3) the need to correct a clear error of law or prevent manifest injustice. *Atkins v. Marathon LeTourneau Co.*, 130F.R.D.

625, 626 (S.D. Miss. 1990).

The court finds that Fly has stated a ripe claim that the County took the road for private use. See Samaad v. City of Dallas, 940 F.2d 925 (5th Cir. 1991). This court erred as a matter of law by not considering the "taking for private use' claim. The court will thus reconsider the remaining arguments made in Yalobusha County's original motion for summary judgment.

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. V. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). An issue of material fact is genuine if a reasonable jury count return a verdict for the non movant. Anderson v. Liberty Lobby, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). In reviewing the evidence, this Court must draw all reasonable inferences in favor of the nonmoving party, and avoid credibility determinations and weighing of the evidence. Reeves v. Sanderson Plumbing Prods. Inc., 530 U.S. 133,150. 120 S.Ct. at 2110, 147 L.Ed.2d 105 (2000). In so doing, the Court must disregard all evidence favorable to the moving party that the jury is not required to believe. Reeves. 530 U.S. at 151, 120 S.Ct. At 2110.

Yalobusha County argues (1) it did not "take" the road, because the road already belonged to the County; (2) any taking was for public use; and (3) the

625, 626 (S.D. Miss. 1990).

The court finds that Fly has stated a ripe claim that the County took the road for private use. See Samaad v. City of Dallas, 940 F.2d 925 (5th Cir. 1991). This court erred as a matter of law by not considering the "taking for private use' claim. The court will thus reconsider the remaining arguments made in Yalobusha County's original motion for summary judgment.

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Yalobusha County argues (1) it did not "take" the road, because the road already belonged to the County; (2) any taking was for public use; and (3) the

statute of limitations bars the instant suit.

The court declines to decide if Yalobusha County took the road from Fly. Even assuming that the Court took the road, Fly's claim fails. The lawyers in this suit have favored the court with no relevant citations on what constitutes a private taking. In their defense, the court has found few Fifth Circuit authorities on point. The paucity of legal ruminations in these matters should not deter the court from seeking a logical answer to this conflict.

Oft accepted legal treatises, while not binding, are helpful. "The burden on the state to show the existence of a public use to justify a taking is remarkably light, requiring only a showing that the state's exercise of its eminent domain power is rationally related to a conceivable public purpose." 26 AM.JUR. 3d Eminent Dom § 44 (2009) (internal citations omitted). "[C]ourts will not interfere with [takings] unless the use is clearly, plainly, and manifestly of a private character." 29 A C.J.S. Eminent Dom §28 (2009) (internal citations omitted).

Courts have consistently held taking of property "for a public highway, street, or road constitutes a public use." 26 AM.JUR. 3d Eminent Dom § 67 (2009) (internal citations omitted). "The taking of land for highways is not limited to that necessary for actual travel." 29 A. C.J.S. Eminent Dom § 30 (2009) (internal citations omitted). Likewise the construction of telephone lines and cables over land is ordinarily a public use. Brown v. Legal Foundation of Washington, 538 U.S. 216 (2003). Courts have held that running telephone lines is a public use no matter how few

customers are affected. 29 A. C.J.S. Eminent Dom § 35 (2009).

The County has the power to take property for pubic use. A roadway open to the public, and as in this case used for the connection of utilities to multiple residences, obviously constitutes a public use. The roadway is open to all members of the community. It provides access to the property of at least three other property owners. Further, the land encompassed is used to provide utilities to those three landowners. The County has the power to take the land in question. No reasonable trier of fact could find otherwise.

The Court does not address any other defenses raised by Yalobusha County since this analysis disposes of the taking for private use claim. Fly also asks the court to retain jurisdiction of this matter because he has a state law torts claim against the County Attorney. The court declines this request.

Summary Judgment on the private takings claim is appropriate in favor of Yalobusha County. The court dismisses without prejudice any state law claims.

Fly's motion to amend the court's prior order is DENIED.

This the 11th day of June, 2009.

/s/ MICHAEL P. MILLS
CHIEF JUDGE
UNITED STATES DISTRICT
COURT NORTHERN DISTRICT
OF MISSISSIPPI

§ 65-7-4. County road systems; official maps; register; hearings; additions, deletions, and changes.

ARCHIVE

Mississippi Statutes
Title 65. HIGHWAYS, BRIDGES AND FERRIES
Chapter 7. Public Roads and Streets; Private Way
Article 1. PUBLIC ROADS AND STREETS GENERAL PROVISIONS

Current through 2009 Legislative Session

§ 65-7-4. County road systems; official maps; register; hearings; additions, deletions, and changes

(1) On or before July 1, 2000, the board of supervisors of each county shall prepare and adopt an official map designating and delineating all public roads on the county road system. Changes to the county road system shall be recorded on this map as soon as is reasonably possible. The map, as it is periodically revised, shall be kept on file in the office of the clerk of the board of supervisors where it shall be available for public inspection.

(2) On or before July 1, 2000, the board of supervisors of each county shall prepare and adopt a county road system register in which shall be entered:

(a) The number and name of each public road on the county road system.

(b) A general reference to the terminal points and course of each such road.

(c) A memorandum of every proceeding in reference to each such road, with the date of such proceeding, and the page and volume of the minute book of the board of supervisors where it is recorded; however, reference to proceedings before July 1, 2000, shall not be required.

(3) Before the initial adoption of the official map and the county road system register, the board of supervisors shall hold a public hearing on the content of the official map and the county road system registry and shall publish notice of the hearing at least one (1) time, not less than two (2) weeks before the date of the hearing, in a newspaper having general circulation in the county.

(4) All subsequent proceedings and changes to the county road system shall be recorded in the county road system register as soon as is reasonably possible. The county road system register, as it is periodically revised, shall be kept on file in the office of the clerk of the board of supervisors where it shall be available for public inspection.

(5) From and after July 1, 2000, the official record of the county road system shall consist of an official map, as provided for in subsection (1) of this section, and the county road system register, as provided for in subsection (2) of this section. The county road system register shall have priority in case of conflict between the register and the official map. The minutes of the board of supervisors containing proceedings with re-

spect to county roads and the county road system shall serve as the official record until such proceedings are recorded on the official map and in the county road system register. The official record of the county road system, at a minimum, shall be revised and updated on or before July 1 of each year.

(6) It is the intention of the Legislature that the initial official record of the county road system prepared and adopted in accordance with this section shall include all public roads that the board of supervisors determines, consistent with fact, as of July 1, 2000, or such date the initial official record is adopted, are laid out and open according to law. From and after July 1, 2000, no road shall be added or deleted from the county road system or otherwise changed except by order or other appropriate action of the board of supervisors and such action shall be recorded in the minutes of the board. All additions, deletions or changes to the county road system shall be recorded in the official record of the county road system as provided for in this section.

Note:

Sources: Laws, 1998, ch. 539, § 1, eff from and after July 1, 1998.

§ 65-7-4.1. Legislative intent.

ARCHIVE

Mississippi Statutes
Title 65. HIGHWAYS, BRIDGES AND FERRIES
Chapter 7. Public Roads and Streets; Private Way
Article 1. PUBLIC ROADS AND STREETS GENERAL PROVISIONS

Current through 2009 Legislative Session

§ 65-7-4.1. Legislative intent

The Legislature of the State of Mississippi finds and determines as a matter of public policy and legislative intent that the proceedings and public hearing required for initial adoption of the official map and county road system register required by Section 65-7-4, Mississippi Code of 1972, are not intended to lay out, open, designate or otherwise establish new public roads, but to document and record existing roads which are, at the time of the initial adoption of said map and register, adjudicated by the board, consistent with fact, to be public roads by dedication, under the methods provided by statute, or by prescription and required by public convenience and necessity.

Note:

Sources: Laws, 2000, ch. 407, § 1, eff from and after passage (approved Apr. 17, 2000.)

§ 65-7-71. Payment for right of way so taken.

ARCHIVE

Mississippi Statutes
Title 65. HIGHWAYS, BRIDGES AND FERRIES
Chapter 7. Public Roads and Streets; Private Way
Article 1. PUBLIC ROADS AND STREETS GENERAL PROVISIONS

Current through 2009 Legislative Session

§ 65-7-71. Payment for right of way so taken

Where the board of supervisors of any county uses the right of way or ditch banks or any levee of any drainage district created in this state, it may pay to the treasurer of the respective drainage districts the value of any right of way taken for road purposes, as done with private individuals.

Note:

Sources: Codes, Hemingway's 1921 Supp. § 7259s1; 1930, § 6347; 1942, § 8321; Laws, 1920, ch. 263.

CONSTITUTION OF UNITED STATES

AMENDMENTS

Current through 2010

Amendment V. Rights of Persons

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CONSTITUTION OF UNITED STATES

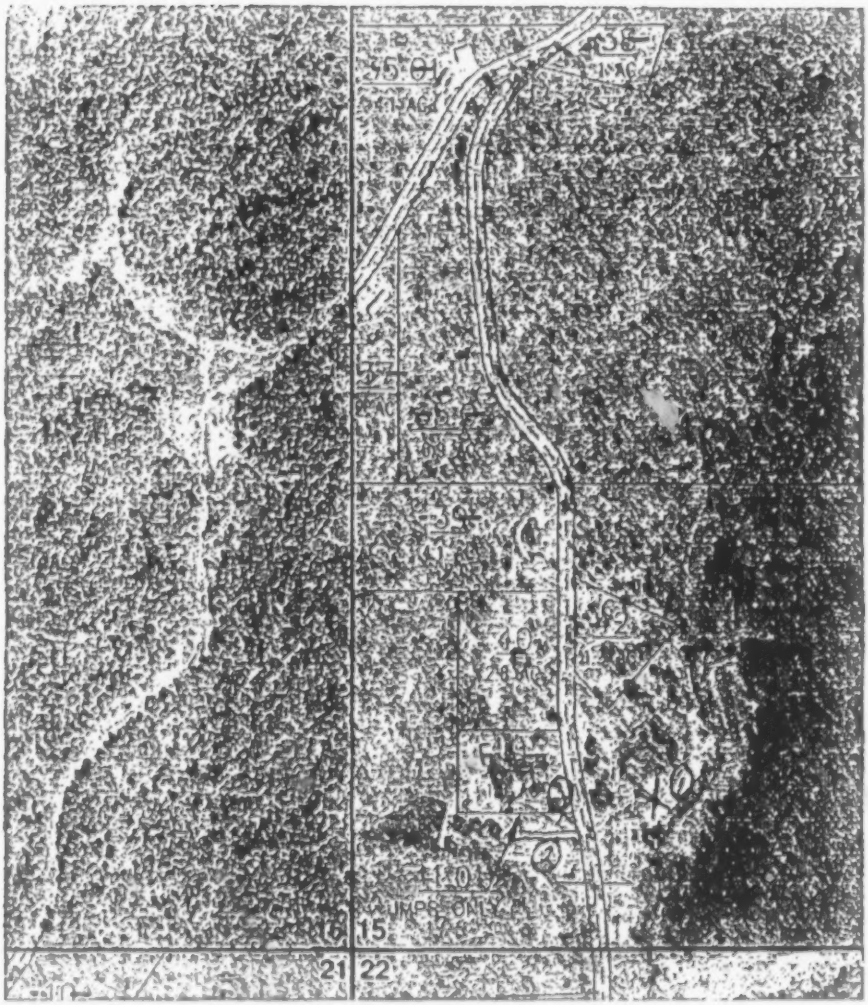
AMENDMENTS

Current through 2010

Amendment XIV. Rights Guaranteed: Privileges and Immunities of Citizenship, Due Process, and Equal Protection

SECTION. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the pro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SUPREME COURT, U.S.
FILED
NOV 15 2010

No. 10-494

In the Supreme Court of the United States

LAWRENCE LITTEN, ET AL,
Petitioners,

v.

GRENADA COUNTY, MISSISSIPPI, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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Counsel for Respondents Grenada County, Mississippi and Michael Lott

November 15, 2010

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QUESTION PRESENTED FOR REVIEW

1. The trial and appellate courts both correctly found that the ripeness requirement of *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), applies to claims of physical takings. The question, as applied in this case, does not involve a genuine dispute between the circuits or a question of broad public interest.

LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court below:

Plaintiff-Petitioners:

1. Lawrence Litten
2. Fletcher Fly

Defendant-Respondents:

1. Michael Lott
2. Grenada County, Mississippi
3. Yalobusha County, Mississippi

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STATEMENT REGARDING JURISDICTION

The issues presented do not involve a genuine conflict of law or a question of broad public interest.

CONSTITUTIONAL PROVISIONS INVOLVED

Although the Petitioner claims the underlying action includes issues touching upon the First, Fourth, Fifth, Sixth, Eighth, Ninth and Fourteenth Amendment to the United States Constitution, the issues presented before this Court concern only the Fifth and Fourteenth Amendments to the United States Constitution, as applied through 42 U.S.C. §1983.

STATEMENT OF THE CASE

On July 17, 2007, Lawrence Litten, (hereinafter referred to as "Litten" or "Petitioner") filed suit against Grenada County, Mississippi and Michael Lott (hereinafter referred to as Respondents), claiming violation of his federal rights under 42 U.S.C. §1983, regarding the public use of Hebron Church Road in Grenada County which ran through portions of property owned by him [R. 8-12]. Litten alleged that Grenada County, Mississippi, through its Board of Supervisors, improperly deemed his private property to be a public road and that he was therefore entitled to damages. [R. 8-12]. Respondents filed an answer specifically denying Litten's claims for relief. [R. 17-24].

Hebron Church Road is a Grenada county public roadway. [R. 155-161]. The road is several miles in length and is a hard surface road averaging about 16

feet in width. [R. 155-161.] It has, for all memory in existence, been a part of the public roadway system of Grenada County. [R. 155-161]. In 2004, the road was identified on the county's registry of roads, which, pursuant to state law, is a public registry of the roadways and rights of ways and uses within the county. [R. 155-161]. Mississippi Code Ann. § 65-7-7 defines the right of way as including the removal of any obstructions to the road.

Litten received the property through a deed which described a "public road" running through the property. [R. 304-312]. In his deposition, Litten conceded that the road was public [R. 304-312].

The Grenada County Tax Assessor has given Litten the benefit of a 50 foot wide right of way for as long as he has owned the property. [R. 155-161]. No objections have ever been made as to the inclusion of Hebron Church Road as a public roadway until the claim which was the beginning of this litigation. [R. 155-161]. Further, the portion of the road which travels through Litten's property has been exempted from his tax during his entire ownership. [R. 155-161]. Grenada County has maintained this road, adding asphalt, cleaning ditches, striping, and generally providing for the safe public access to the road. [R. 155-161].

The litigation filed by Litten in the District Court had its roots in a claim filed by him in July of 2006 that "Grenada County's right to use Hebron Church Road is only by [his] permission and is restricted only to the length and width of the road's pavement, and that Grenada County has no extended right of way from the hard surface of the road for purposes of maintenance." [R. 175-179]

On December 7, 2006, the Grenada County Board of Supervisors considered and denied the claim of Litten and their decision was recorded in the Board of Supervisors minutes. [R. 155-161]. Thereafter, Litten filed a complaint/appeal of this decision in the Circuit Court of Grenada County, Mississippi, Cause No. 2007-019CVM on January 11, 2007, 35 days after the entry of the order of the board of supervisors of Grenada County. An Amended Notice of Appeal was filed on February 28, 2007. [R. 180-184]. The state suit asserted virtually identical facts and theories as are offered in this new Federal claim. [Compare R. 8-12 with R. 180-184]. The state suit was dismissed as untimely under state law. [R. 185].

On October 29, 2007, Respondents filed a Motion to Dismiss in the District Court action based upon the principles or res judicata and collateral estoppel. The District Court denied the motion but found that the only issue remaining was Litten's claim for inverse condemnation. [R. 186-187].

On July 30, 2008, Respondents filed their Motion for Summary Judgment in the District Court, arguing that Litten's sole remaining claim was for federal inverse condemnation and that claim was not yet ripe and even if Litten had any remaining state law claims, they should also be dismissed. [R. 150-154]. On November 14, 2008, the Court granted Summary Judgment in favor of Respondents, finding that "[Litten's] federal inverse condemnation/taking claim is the only jurisdictional basis for this case being brought in federal court and that, by failing to first pursue his remedies in state court, he failed to lay the proper jurisdictional predicate for this action. This

action is therefore due to be dismissed as unripe." [R. 365-369].

The case was dismissed that same day. [R. 370]. Litten's Motion for Reconsideration was denied on May 18, 2009. [R. 391-392]. In that order, the District Court points out:

> If federal jurisdiction in the present context were as broad as plaintiff suggest, then it is likely that federal courts in this state would be inundated with property disputes between Mississippi residents and municipalities. This case is, in fact, a simple property dispute between a Mississippi resident and county, and Mississippi law provides plaintiff with a clear avenue for seeking compensation in this matter. It appears that plaintiff essentially gave up on pursuing this compensation in state court, and having done so, is in no position to assert that he has been deprived of his rights under the U.S. Constitution.

[R. 391-392]

Litten filed a notice of appeal on June 17, 2009. [R. 393]. This case was subsequently consolidated for briefing with *Fletcher Fly v. Yalobusha County*, Case No. 09-60502. On February 23, 2010, the Fifth Circuit Court of Appeals affirmed the grant of summary judgment in both cases.

REASONS FOR DENYING WRIT

Petitioner's request for certiorari rests solely on his claim that the Fifth Circuit Court of Appeals, in its affirmation of the District Court's grant of Summary Judgment, disregarded a dichotomy between regulatory and physical taking under the Fifth Amendment. As will be demonstrated, this assertion is incorrect and ultimately totally irrelevant in determining the status of Litten's claim.

The analysis begins with *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), in which this Court made it abundantly clear that a federal takings claim does not ripen until just compensation is denied. Therefore, for a federal takings claim to become ripe, Litten had to seek compensation through the procedures provided by the state of Mississippi. The procedures outlined in Miss. Code Ann. §11-57-75 were available to Litten and he failed to take advantage of those procedures.

The *Williamson* decision addressed "the question whether federal, state, and local governments must pay money damages to a landowner whose property allegedly has been 'taken' temporarily by the application of government regulations." *Id.*, at 185. In *Williamson*, this Court found that the underlying jury verdict awarding damages for the taking was not ripe because 1) a final decision had not been obtained as to the extent of the regulation's application to the property, and 2) there had been no attempt to seek compensation through post-deprivation procedures. *Id.*, at 186. "Because respondent has not yet obtained a final decision regarding the application of the zoning ordinance and subdivision regulation to its property,

nor utilized the procedure Tennessee provides for obtaining just compensation, respondent's claim is not ripe." *Id.*

The analysis provided by *Williamson* is two-fold. First, an analytical approach must be utilized to determine whether a regulation can be considered a "taking." *Id,.* at 192. Secondly, and critical to Litten's claim, until just compensation has been sought through post-deprivation remedies, the State's action is not "complete in the sense of causing a constitutional injury." *Id.*, at 195. As Litten clearly did not avail himself of the procedures provided for by the state of Mississippi to ensure due process of law, his claim is not ripe and this Petition must be denied.

Prior jurisprudence provides a firm foundation for the *Williamson* decision. "The Fifth Amendment [does not] require that just compensation be paid in advance of, or contemporaneously with the taking; all that is required is that a 'reasonable, certain and adequate provision for obtaining compensation' exist at the time of the taking." *Id.*, at 194, citing *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-125 (1974) (quoting *Cherokee Nation* v. *Southern Kansas R. Co.*, 135 U.S. 641,659, (1890)). See also *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, at 1016 (1984); *Yearsley* v. *W.A. Ross Construction Co.*, 309 U.S. 18, 21, (1940); *Hurley v. Kincaid*, 285 U.S. 95, 104, (1932). Therefore, it is clear that until a property owner (such as Litten) has sought out relief through adequate post-deprivation remedies he has not been denied just compensation, and therefore does not have a Fifth Amendment takings claim.

Preseault v. Interstate Commerce Commission et al. 494 U.S. 1 (1990), followed the *Williamson* decision in dealing with a physical taking. In *Preseault*, this Court examined a federal program which converted unused railway lines into hiking trails. *Id.*, at 9. Petitioners in the underlying case owned land adjacent to a railroad right-of-way and sued to quiet title in themselves, arguing that upon the railroad's abandonment the title reverted to them under state property law. *Id.* On appeal, this Court found that the Fifth Amendment does not prohibit takings and, citing *Williamson County,* held "if the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government for a taking.'" *Id., citing Williamson County, supra,* 473 U.S. at 194.

In a subsequent lower court action, *Preseault v. United States,* 100 F.3d 1525 (Fed. Cir. 1996) (hereafter, *Preseault II),* the Federal Circuit Court of Appeals again reviewed the federal program. Citing *Loretto* v. *Teleprompter Manhattan CATV Corp.,* 458 *U.S.* 419 (1982), *the* Court found that "a physical occupation of one's property by the Government, that is, a taking of a recognized property interest, invokes a general expectation of compensation." *Id.,* at 1540, *citing Loretto* v. *Teleprompter Manhattan CATV Corp.,* 458 *U.S.* 419 (1982). A regulatory taking issue arises when a government places restraints on a person's use of their property, while a physical taking issue arises when the government physically occupies the property; "both factually and legally raises significantly different issues." *Id.*

> As the Supreme Court makes clear, these two quite different situations call for quite different analyses. The Government's attempt to read the concept of "reasonable expectations" as used in regulatory takings law into the analysis of a physical occupation case would undermine, if not eviscerate, long-recognized understandings regarding protection of property rights; it is rejected categorically. . .The trial court erred in accepting the Government's effort to inject into the analysis of this physical taking case the question of the owner's "reasonable expectations."

Presault II, at 1540, *citing Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 124.

In its decision upholding summary judgment granted by the District Court in this case, the Fifth Circuit Court of Appeals cited *Severance v. Patterson,* 566 F.3d 490,496 (5th Cir. 2009). In *Severance*, the Appellant argued that the rule from *Williamson County* did not apply to physical takings, but only to "regulatory takings." The Fifth Circuit Court of Appeals stated that that such an argument is "foreclosed in this circuit." *Id.*, at 497, *citing Urban Developers LLC v. City of Jackson, Miss.*, 468 F.3d 281, 294-95 (5th Cir. 2006). In their analysis of *Williamson County,* the Fifth Circuit found that there were two prongs for determining whether a claim was ripe under the takings clause:

1) the relevant governmental unit has reached a final decision as to how the regulation will be applied to the landowner, and

2) the plaintiff has sought compensation for the alleged taking through whatever adequate procedures the state provides.

Severance, at 496.

As *Severance* involved a physical taking case, only the second prong was at issue. *Id.* The Appellant argued that even if all takings required exhaustion of post deprivation remedies, she had satisfied that prong, as the procedures under Texas law for seeking compensation were unavailable. *Id.,* at 97. The Fifth Circuit denied this argument, specifically citing the holding in *Williamson County* that the takings claim therein was "premature" due to the petitioner's failure to seek compensation through Tennessee's judicial inverse condemnation procedure." *Id.*

Finally, the Appellant in *Severance* contended that she should not be required to pursue state court litigation, because *Williamson County* required only administrative exhaustion. *Id.* The Fifth Circuit found, however, that her contention was "at odds with multiple decisions of this court that found takings claims unripe when the claimant failed to seek compensation in state courts before filing a federal claim." *Id.*

Contrary to the assertions of the Petitioner regarding a dichotomy between physical and regulatory takings, this Court has made clear that the test used for determining whether a regulatory taking has occurred **should not be applied** when determining whether a physical taking has occurred. *See Keystone Bituminous Coal Ass'n* v. *Debenedictis,* 480 U.S. 470, 517 (1987). "No one, however, would find

any need to employ theses analytical tools where the government has physically taken an identifiable segment of property." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302 (2002). "This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a regulatory taking." *Yee* v. *City of Escondido,* 503 U.S. 519, 522, (1992). "The first category of cases requires courts to apply a clear rule; the second necessarily entails complex factual assessments of the purposes and economic effects of government actions." *Id.* Therefore, under these decisions, as there was only a physical taking in this case, there is no conflict on this issue among the Circuits.

The *Williamson County* decision established that there are two prongs for a takings claim brought under 42 U.S.C. § 1983 to be ripe: 1) a final decision by the governmental body as to how the regulation will be applied to the landowner's property must be obtained and 2) an exhaustion of available post-deprivation remedies must not have garnered just compensation for the landowner. The *Preseault* decision applied the *Williamson County* ripeness doctrine to a physical taking. The Appeals Court for the Federal Circuit spoke as to the dichotomy of the regulatory and physical takings, and clearly explained that it is the test devised to determine whether a regulation affects a taking that must not be errantly used in determining whether a government has committed a physical taking. Finally, the Fifth Circuit Court of Appeals conclusively stated in *Severance* (the case relied upon

by the Circuit Court in upholding the District Court's grant of summary judgment) that before a takings claim under the Fifth Amendment is ripe, the second prong of the *Williamson County* test must be satisfied. In a physical takings claim, the claimant must have availed himself of the available post-deprivation remedies and been denied just compensation before a Fifth Amendment takings action arises.

Finally, the decisions in *Tahoe-Sierra*, *Keystone Bituminous Coal Ass'n*, *Yee*, and *Preseault II* make clear that a Court may not use the principles for determining whether a regulatory taking has occurred to answer the question of whether a physical taking has occurred. The different types of government action, either physical occupation or regulation of private use, invoke different types of factual and legal analysis. Before a court can address those issues however, a case must be ripe. The decisions in *Tahoe-Sierra*, *Keystone Bituminous Coal Ass'n*, *Yee*, and *Preseault II* set out the factual and legal analysis to determine whether Litten's claim is ripe. Ripeness applies to all takings cases, temporary or permanent, regulatory or physical, brought under 42 U.S.C. § 1983 and must be answered prior to engaging in any further analysis of whether a government action was a taking. The Fifth Circuit Court of Appeals correctly followed this analysis in its affirmation of the District Court's grant of summary judgment.

In applying the law of these cases to the facts, it is clear that Litten's claim is not ripe and his Petition therefore should not be granted. The roadway which is the basis of Litten's claim has, for all memory in existence, been a part of the public roadway system of Grenada County. [R. 155-161]. In 2004, the road was

specifically identified on the county's public registry of the roadways and rights of ways and uses within the county. [R. 155-161]. Litten cannot claim that he did not know that Hebron Church road was not a public roadway after this identification or that he was not aware of a potential inverse condemnation claim.

In 2004, there was a procedure in place to appeal the Board's decision to adopt the published map which identified the disputed property as a public road. Miss. Code Ann. § 11-57-75 provides that a person aggrieved by a decision of a board of supervisors may appeal to the circuit court of the subject county and that appeal must be filed within ten days from the date the Board of Supervisors rendered such decision. Further, Uniform Circuit and County Court Rule 5.04 permits that appeals from lower tribunals must be filed within 30 days of the entry of the order. No claim or appeal was made by Litten until 2006 when he filed his state court claim. [R.155-161]. Therefore, the claim or appeal made by Litten for a "takings" based claim, such as inverse condemnation, was untimely.

Litten clearly did not avail himself of the procedures provided for by the Mississippi Legislature to ensure due process of law. A procedure for Circuit Court review of a decision of the Board of Supervisors was provided by statute; therefore, there was no taking of the Litten's property without due process of law. The U.S. Supreme Court has "rejected the proposition that 'at a meaningful time and in a meaningful manner' always requires the State to provide a hearing prior to the initial deprivation of property." *Parratt v. Taylor,* 451 U.S. 527, 540 (1981)

Therefore, Litten's takings claims against Grenada County under the Fifth Amendment of the United States Constitution through 42 U.S.C. § 1983 were and remain premature for federal intervention. The District Court was correct in granting summary judgment as to these claims and the Fifth Circuit was correct in upholding that decision.

CONCLUSION

Based on the foregoing arguments, the petition for writ of certiorari should be denied.

RESPECTFULLY SUBMITTED, this the 15th day of November, 2010.

Defendants, Michael Lott and
Grenada County, Mississippi

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No. 10-494

In the Supreme Court of the United States

LAWRENCE LITTEN, ET AL.,
Petitioners,

v.

GRENADA COUNTY, MISSISSIPPI, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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December 14, 2010

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QUESTION PRESENTED FOR REVIEW

1. Does the ripeness requirement of *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), that a person must first exhaust his state court remedies before bringing a fifth amendment takings claim in federal court, apply to physical takings?

LIST OF PARTIES

The following is a list of all parties to the proceeding in the Court below:

Plaintiff-Petitioners:

1. Lawrence Litten
2. Fletcher Fly

Defendants-Respondents:

1. Michael Lott
2. Grenada County, Mississippi
3. Yalobusha County, Mississippi

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STATEMENT REGARDING JURISDICTION

This Court lacks subject matter jurisdiction of this matter, as Fletcher Fly has not perfected his claims by exhausting his available state remedies for just compensation, and therefore this case is not ripe for adjudication in the federal courts.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner filed suit against Yalobusha County, Mississippi in the United States Court for the Northern District of Mississippi pursuant to 42 U.S.C.A. § 1983, alleging that Yalobusha County, Mississippi, violated his rights secured by the 5th and 14th Amendments of the Unites States Constitution.

STATEMENT OF THE CASE

Petitioner alleges that in the year 2000 he suffered an uncompensated taking of his land, due in part to the passage of Miss. Code Ann. §§ 65-7-4, et seq. The passage of this law was to map and register the county roads of Mississippi. The legislative intent of this statute is laid out in the following section which states in part that:

> the proceedings and public hearing required for initial adoption of the official map and county road system register ...are **not intended to lay out, open, designate or otherwise establish new public roads**, but to document and record existing roads which are, at the time of the initial adoption of said map and register, adjudicated by the board, consistent with fact,

> to be public roads by dedication, under the methods provided by statute, or by prescription and required by public convenience and necessity.

Miss. Code. Ann. § 65-7-4.1 (West), (*emphasis added*).

Petitioner alleges in his Petition that "the statute required that if a right of way were to be added to the prescriptive easement over a historically publicly used road, the County must pay for it." citing Miss Code Ann § 65-7-7. This statement is false, as Miss. Code Ann. §65-7-7 relates to the clearing of obstructions along county roads, and §65-7-71, relates to the payment for rights-of-way to a drainage district.

Statement of the facts:

Fletcher Fly inherited land from his father in 2001. This land contains approximately 162.4 acres and is traversed by a public road. This road has been recognized by Yalobusha County as Yalobusha County Road 161 since 2000, and prior thereto, dating back to 1942, as the Henry Hudson Road. (RE 135-138). Appellant has stated that the road has been there as long as he can remember. (RE 182). The Yalobusha County Tax Assessor only assesses Fletcher Fly for 160.2 acres. 2.2 acres is taken out of Appellant's total acreage because it is contained within County Road 161. (RE 135-138).

Appellant admitted that from 1985 to 2003 County Road 161 was maintained by Yalobusha County from its beginning to its Northern portion. (RE 171). Specifically in 1996, County Road 161 was listed on the county road system, maintained by the county, and

found to be in satisfactory condition as evidenced by entry on the minutes of the Board of Supervisors. (RE 172-181). However, there was a segment of County Road 161, approximately 350 feet in length, that received no county maintenance for approximately three years. (RE 140-143).

In 2000, pursuant to Miss. Code Ann., § 65-7-4, the Yalobusha County Board of Supervisors established a county road register and official map. On May 25, 2000, a notice that a public hearing would be held on June 12, 2000 seeking public comment on the official county map and road system registry was published in the North Mississippi Herald and Coffeeville Courier, newspapers of general circulation throughout Yalobusha County. A hearing was held on such date and time, but no interested members of the public attended. (RE 183-188). This is reflected in the June 16, 2000 Order of the Board of Supervisors, wherein the map and registry were adopted. *Id.*

Pursuant to the aforementioned order, Yalobusha County posted the road running through Appellant's property with a sign bearing the words "CR 161". (RE 153-156). Appellant stated that he first learned about the road being named County Road 161 somewhere about the year 2000 or 2001. (RE 189).

Appellant acknowledged that from 2003 to date, Yalobusha County has maintained the road. (RE 190). He also acknowledged that Yalobusha County has been claiming and referring to the road that ran through his property as County Road 161 since 2002. (RE 191).

Appellant filed suit before the United States District Court for the Northern District of Mississippi on January 22, 2008. Paragraph 2 of the Appellant's Complaint clearly states that County Road 161 "had, indeed once been a public road." (RE 195-204). Yalobusha County has never abandoned County Road 161 by minute entry. (RE 205). Furthermore, Appellant does not contend, nor has proof been presented, that he or his family ever gave permission to the public to use the road.

In 1979, the Tillatoba Water Association constructed a water line within the right-of-way of County Road 161. This water line begins at the intersection of County Road 161 and County Road 154 and extends in a northerly direction into Section 19. (RE 168-169). Other public utilities such as AT&T (1985) and Tallahatchie Electric Power Association use County Road 161 to provide service to the LaGassee family, the Magee Hunting Club and David LaGasse. (RE 168-170). Such utilities have served the area landowners for forty years. *Id.* During this service, the utility companies have had to go down County Road 161 for inspection and repairs of their transmission lines. *Id.* There are presently three (3) dwellings located on land near County Road 161. One is occupied by the LaGasse Family as a weekend retreat, one is owned by David LaGasse, which is also used for recreational purposes, and the remaining cabin is occupied by the Magee Hunting Club. All three owners use County Road 161 for ingress and egress to their properties. (RE 153-156).

Disputed Facts:

Appellant has mentioned in his dissertation of the facts, Mr. Tillman's complaint of a road washout along County Road 161. The testimony from Mr. Tillman's deposition shows that the portion of road washed out lies in section 19. In his deposition, Mr. Tillman stated that:

> the road washed out just after you passed the Magee Hunting Club **on the Walker land**...and he [Mr. Moorman] asked Mrs. Walker if it would be all right with her for me to go around on her property, you know, and come back in the main road down below where it was washed out, and she said it would be. (emphasis added, text in brackets added for clarity)

Mrs. Irene Walker's property is in Section 19, her property line lies along County Road 161 at its current northern most boundary, which is also the North line of Section 30, and/or the South line of Section 19. (RE 139). (RE 241). At one time County Road 161 extended North into Section 19, and into Mrs. Walker's land. (RE 140-143). All of Fletcher Fly's property and the sections of road involved in this suit are located in section 30. Therefore, Mr. Tillman's problems in the early 1980s to the north of Plaintiff's property in section 19 are unrelated to this suit, because during this time he states that he continued to use the remainder of County Road 161 to access his property. "So all of it --- all of the years I had of the place after that, I went around Mrs. Walker getting to my property." (RE 242). The only significance of Mr. Tillman's problems in section 19 is the evidence it

provides the Court of the public's continued uninterrupted use of County Road 161.

As for the Mississippi Attorney General's Opinion request written by Defendant's attorney, the Opinion restates the facts provided them as following: "County maintenance from Point A to Point B has been almost nonexistent within the last 20 years." (RE 243-244). The Opinion does not state that there was no maintenance as contended by Appellant.

Also, incidental to the issue before the Court today, is the fact that nowhere in the record at pages 97-98 does it state that the Walker's requested that the County "retake" their driveway nor does it state that the Board of Supervisors of Yalobusha County granted any such request.

The dispute of facts above are not material to the District Court's rulings, and reference is made hereto solely for the Court's convenience.

Statement of the Procedural History:

Fletcher Fly approached the Yalobusha County Board of Supervisors and asked that County Road 161 be abandoned, or in the alternative, he be paid for the alleged taking of the road by the County. (RE 10-12). The Yalobusha County Board of Supervisors informed him that his request was improperly submitted. Thereafter, the Appellant submitted an Amended Complaint to the Board. (RE 13-15).

Thereafter, Fletcher Fly filed a complaint with the United States District Court for the Northern District of Mississippi alleging that his 5th and 14th

amendment rights had been violated. (RE 6). After the conclusion of discovery, Yalobusha County filed a Motion for Summary Judgment and supporting memorandum and exhibits. (RE 105-205). The Court found that Fletcher Fly's claims were not ripe for federal jurisdiction, as he had not exhausted his available state court remedies. (RE 272-273). After the Order granting Summary Judgment was filed, Fletcher Fly moved to Reform the Judgment pursuant to Rule 59 of the Federal Rules of Civil Procedure Motion. He alleged therein that he had presented a claim for a private taking. (RE 274-277). The District Court, over Yalobusha County's objections, found that Fletcher Fly had made a claim for an alleged private taking that warranted a reform of judgment, but that said claim fell under three of Yalobusha County's prior Summary Judgment arguments. (RE 322-326). Upon review of the pleadings and facts presented through discovery, the District Court found that there was no genuine material issue as to the fact that County Road 161 is a public road, and that therefore Summary Judgment as to Appellant's private takings claim was appropriate. (RE 322-326).

This matter was subsequently appealed to the 5th Circuit Court of Appeals who affirmed the District Court's ruling that Fletcher Fly's claims for relief were not ripe for redress.

Fletcher Fly, admittedly, has never sought state court relief.

REASONS FOR DENYING WRIT

Fletcher Fly asserts that *Williamson County's* ripeness requirements apply only to regulatory

takings, and that there is a split among the circuits as to whether the ripeness requirements apply to physical takings, of which, the 5th Circuit Court of Appeals is a minority. This however is not the case. In the matter sub judice, the 5th Circuit held the following:

> the two cases in this consolidated appeal have no mutual parties or shared factual circumstances, yet both present the threshold issue of whether the ripeness requirement in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), applies to claims of physical takings. We recently held that it does.

368 F. App'x 487 (5th Cir. 2010) *See Severence v. Patterson*, 566 F.3d 490, 496-97 (5th Cir. 2009)(*citing Urban Developers LLC v. City of Jackson, Miss.*, 468 F.3d 281, 294-95 (5th Cir. 2006).

Before delving into the issue of whether the Circuits are split, it is important to note that this issue has already been addressed by this Court in *Preseault v. Interstate Commerce Commission et al.*, 494 U.S. 1 (1990). As stated in Appellee's brief to the 5th Circuit, the Supreme Court in *Williamson County* established that there are two prongs that a claimant must satisfy for a takings claim brought under 42 U.S.C. § 1983 to be ripe. The first prong is whether a final decision by the governmental body has been obtained addressing how the regulation will be applied to the landowner's property. The second prong is whether the suffering landowner exhausted his available post-deprivation remedies in an attempt to garner just compensation. The Supreme Court in *Preseault* applied the second

prong of the *Williamson County* ripeness doctrine to a physical taking.

The Supreme Court in *Preseault,* which was an appeal from the 2nd Circuit, began its analysis by qualifying that the 5th Amendment does not prohibit takings, it only secures compensation in the event that there is a taking. *Id.*, at 11 *citing First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles,* 482 U.S. 304, 314 (1987). "If the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government for a taking.' " *Id. citing Williamson County, supra*, 473 U.S., at 194. The Supreme Court then stated that the vehicle for seeking compensation for unconstitutional actions committed by the Interstate Commerce Commission was the Tucker Act, and that the proper venue for such an action was before the Federal Claims Court. *Id.*, at 17. The Court concluded that until the petitioners failed to receive compensation using the remedies provided by the Tucker Act, their takings claim was not ripe. *Id.*, at 17.

In support of his argument that the Circuits are split on this matter, Fletcher Fly states that the 5th, 7th, and 11th Circuits comprise a minority that requires "state judicial exhaustion" in a physical takings case. He then goes on to list a case for each Circuit that supports his alleged split. There is a fundamental problem with this list, however, because *Williamson County* is only cited in two out of the ten cases which allegedly support the "*Williamson County* physical/regulatory distinction." Further, none of the listed cases delve into the physical taking ripeness

issue. The two cases which do cite *Williamson County*, one of which, at least, refers to ripeness, only discuss the case in dicta. The case Fletcher Fly cited for the Ninth Circuit explicitly sidestepped the issue by stating that "we do not resolve whether this claim is ripe under the standards articulated in *Williamson*, and instead assume without deciding that the taking claim is ripe in order to address the merits of the appeal." *McClung v. City of Sumner*, 548 F.3d 1219, at 1224 (9th Cir. 2009). The other case that cites *Williamson, Building Owners & Managers Ass'n v. FCC*, does so in the concurring opinion as support for the argument that the Tucker Act allows the federal government to be held liable for takings. 254 F.3d 89, at 101 (D.C. Cir. 2001).

In an effort to provide the Court with an accurate view of the Circuit's holdings on this matter, here is a list of cases that actually cite *Williamson County*, and which are discussing ripeness issues.

The First Circuit Court of Appeals in *Pascoag Reservoir & Dam, LLC v. Rhode Island*, held the following:

> Although *Williamson County* was a regulatory taking case, a modified version of its timeliness analysis applies to physical taking cases. *Daniel v. Cnty. of Santa Barbara*, 288 F.3d 375, 382 (9th Cir. 2002). The present case concerns a potential physical taking, based on the intrusion onto Pascoag's property or the acquisition of rights in that property. In a physical taking case, the final decision requirement is relieved or assumed because "[w]here there has been a physical invasion, the

> taking occurs at once, and nothing the [governmental actor] can do or say after that point will change that fact." *Hall v. City of Santa Barbara,* 833 F.2d 1270, 1281 n. 28 (9th Cir. 1987)...However, the state action requirement remains in physical taking cases: "[C]ompensation must first be sought from the state if adequate procedures are available." *Sinaloa Lake Owners Ass'n v. City of Simi Valley,* 882 F.2d 1398, 1402 (9th Cir. 1989), *overruled on other grounds by Armendariz v. Penman,* 75 F.3d 1311, 1326 (9th Cir. 1996) (en banc).

337 F.3d 87, at 91 (1st Cir. 2003).

The Second Circuit Court of Appeals in *Villager Pond, Inc. v. Town of Darien* held the following:

> Villager Pond attempts to avoid this result by contending that a plaintiff who alleges a physical taking, as opposed to a regulatory taking, is not required to seek compensation in a state proceeding before the claim will be considered ripe...We reject Villager Pond's contention...*Williamson* drew no distinction between physical and regulatory takings, and the rationale of that case, that "a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedure provided by the State," 473 U.S. at 195, 105 S.Ct. at 3121, demonstrates that any such distinction would be unjustified. Thus, regardless of whether Villager Pond's claim alleges a physical

> or regulatory taking, the claim is not yet ripe for review."

56 F.3d 375, at 380 (2nd Cir. 1995).

The Third Circuit Court of Appeals in *Miles v. Township of Barnegat* stated the following:

> We agree with the District Court's conclusion that the Plaintiff's taking claims are not ripe for review under *Williamson County*, as they have not availed themselves of their remedies under New Jersey law...The Plaintiffs argue that their challenge to the "direct conduct" of the Ocean County and Barnegat Township defendants in taking their property without instituting an eminent domain proceeding, is the kind of "facial" taking claim that is not subject to *Williamson County*...Here, the plaintiff's inverse condemnation claim seeks just compensation, not the invalidation of an ordinance or statute on its face. Accordingly, we will affirm the judgment of the District Court.

334 F. App'x 841, at 845 (3rd Cir. 2009).

The Fourth Circuit Court of Appeals in *Plakas v. County of Middlesex, Virginia*, held the following:

> The Plakas claimed under 42 U.S.C. § 1983 a taking of their private property without just compensation and a denial of due process by the County's operation of the public pier...*Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 53 U.S.L.W. 4969 (U.S. June 28, 1985), dictates that the

> proper disposition of these claims was a dismissal for prematurity rather than abstention followed by dismissal on the merits for failure to "exhaust" state remedies...In the instant case, the State of Virginia has procedures for obtaining just compensation which the Plakas have failed to utilize. Va. Code § 8.01-187 (1950 amended) provides compensation for both takings and damage to property, and provides a statutory mechanism for enforcing inverse condemnation claims under the Virginia Constitution's just Compensation Clause.

803 F.2d 714, at 3 (4th Cir. 1986), unpublished opinion.

The Sixth Circuit Court of Appeals in *Eaton v. Charter Township of Emmett* held the following:

> Although appellants assert that this was a "physical" rather than "regulatory" taking, even if this is true, the distinction is of no consequence. As this court has noted, the distinction between physical and regulatory takings is "fuzzy at best."...assuming arguendo that Emmett's demolition of the buildings constituted a physical taking, appellants were still required to seek compensation, which they clearly have not done.

317 F. App'x 444, at 451 (6th Cir. 2008), unpublished opinion. The 6th Circuit Court of Appeals furthered opined in *Coles v. Granville* that:

> Over the last ten years Ohio courts, including the Ohio Supreme Court, have consistently recognized mandamus as the vehicle with which to contest an involuntary taking, no matter whether that taking is a regulatory or physical one, and no matter whether the public actor is a state or local entity. Because the Supreme Court's direction in *Williamson* requires us to assess the adequacy of state measures, these differences in the state of Ohio decisional law require this Court to reach a different conclusion today than that reached by the *Kruse* panel ten years ago...In the instant case there is no dispute that Plaintiffs have failed to request mandamus from the state. There case is therefore not yet ripe for review.

448 F.3d 853, at 865 (6th Cir. 2006).

The Eighth Circuit Court of Appeals in *Metzger v. Village of Cedar Creek, Nebraska* also dealt with a physical taking. In that case, the Appellant argued that the construction of an earthen levee alongside a creek caused substantial flooding and damage to her neighboring farm. *Metzger*, 370 F.3d 822, 823 (8th Cir. 2004).

> Metzger filed a lawsuit against Cedar Creek and Fuxa, alleging they conspired to take her property without just compensation in violation of (1) the Fifth and Fourteenth Amendments to the United States Constitution...The district court ruled Metzger's claims were not ripe under *Williamson*, and thus, the district court lacked subject matter jurisdiction over the claims, because Metzger failed to allege she had

> pursued and exhausted her administrative remedies for just compensation under state law...Having reviewed Metzger's complaint, we conclude the district court correctly determined *Williamson* controls and requires Metzger to obtain a final decision by the state administrative entity charged with implementing the applicable regulations, or by the appropriate state court action, before her claims are ripe for adjudication...Without Metzger pursuing one of these procedures, or some other appropriate state action, the district court could not determine whether Cedar Creek and Fuxa denied Metzger just compensation.

Id.

The Ninth Circuit Court of Appeals in *Sinaloa Lake Owners Association v. City of Simi Valley*, found the following:

> Defendants argue, and the district court held, that this claim is not ripe because plaintiffs have failed to exhaust their state remedies. Defendants rely on *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed2d 126 (1985)...A physical taking, such as the one at issue here, is by definition a final decision and thereby satisfies *Williamson County's* first exhaustion requirement. The second, and independent, hurdle established by *Williamson County* requires plaintiffs to "seek compensation through the procedures the State has provided for doing so" before turning to the federal courts...Plaintiffs, citing footnote 28 of *Hall*,

> contend that the second requirement of *Williamson County* is also inapplicable to physical invasion cases. That footnote however, only relieves plaintiffs of the obligation to exhaust administrative remedies in physical taking cases-it does not excuse them from seeking just compensation through state procedures. Even in physical taking cases, compensation must first be sought from the state if adequate procedures are available.

882 F.2d 1398, at 1402 (9th Cir. 1989). The district court's judgment that the taking claim was not ripe was affirmed. *Id.*, at 1411.

The Tenth Circuit Court of Appeals was confronted with a similar case to the one sub judice in *J.B. Ranch, Inc. v. Grand County*. In that case, Utah passed a statute requiring "all roads, including those not regularly maintained, which it deemed were established public thoroughfares" to be identified. *J.B. Ranch*, 958 F.2d 306, at 307 (8th Cir. 1992). In enacting the statute, the County declared roads inside of the J.B. Ranch, Inc.'s property to be public thoroughfares, and informed them via letter that "it could not lock the gates to the ranch." *Id.*

> The corporation seeks only declaratory relief in the form of a judgment quieting title to the roads. After reviewing the record and legal issues involved in this case, we hold that Plaintiff's claims are not ripe for review in this court...In *Williamson*, the Supreme Court noted that "a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to

> obtain just compensation through the procedure provided by the State for obtaining such compensation." 473 U.S. at 195.

Id, at 308. In summary, the 10th Circuit Court of Appeals stated that the "facts of this case fall squarely within Fifth Amendment analysis," and held that the Appellant's constitutional claims were not ripe. *Id.*, at 309.

As for the Federal Circuit, it does not appear that a case with the requisite facts have come before it to enable that Court to voice its opinion on the matter. The case Fletcher Fly has supplied, *Casitas Municipal Water District v. U.S.*, 556 F.3d 1329 (Fed. Cir. 2009), neither cites *Williamson County* nor discusses the ripeness issues at question here.

Similarly, this issue does not seem to have come before the D.C. Circuit either. The question presented before the D.C. Circuit Court of Appeals in *Building Owners & Managers Ass'n v. FCC* is whether a taking had occurred as a result of the adoption of the Telecommunications Acts of 1996: Restrictions on Over the Air Reception Devices (OTARD). 254 F.3d 89, at 100. "Accordingly, because petitioners' facial challenge fails to present an 'identifiable set of instances in which mere application of [the amended OTARD rule] will necessarily or even probably constitute a taking'...we apply *Chevron* deference to the Commission's interpretation..and we deny the petition." *Id.* The issue of ripeness is not discussed in the opinion, and *Williamson* County is cited only in the concurring opinion as support for the proposition that "claims against the Federal Government are

premature until the property owner has availed itself of the process provided in the Tucker Act." *Id.* at 101.

So, after reviewing law that is actually applicable to the case sub judice, one finds that the country is not so divided or split as the Appellant, Fletcher Fly, would lead the Court to believe. In fact, the Circuits are not split at all, as shown above, they actually agree. Before the federal court can obtain subject matter jurisdiction for a Fifth Amendment "physical taking" claim, the claimant must first exhaust their available state remedies to seek just compensation.

CONCLUSION

The cases cited above directly refute Fletcher Fly's contention that physical takings claims are not required to satisfy the *Williamson County* ripeness standard, and that there is a split among the circuits. Accordingly, the Petition for Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED, this the 14th day of December, 2010.

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